TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION, APPELLANT,

vs.

FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MAY 29, 1944.

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[fol. 1]

IN DISTRICT COURT OF HENNEPIN COUNTY, FOURTH JUDICIAL DISTRICT

RUTH CHASE DONALDSON, Plaintiff,

vs.

CHASE SECURITIES CORPORATION, a Corporation, Now Known as AMEREX HOLDING CORPORATION, Defendant

SUMMONS

State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff herein, which complaint is hereto annexed, and to serve a copy of your answer thereto upon the subscriber at his office in the city of New Ulm, Brown County, Minnesota, within thirty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint, together [fol 2] with the costs and disbursements of this action.

Dated this 23rd day of September, 1937.

T. O. Streissguth, Attorney for Plaintiff, New Ulm, Minn.

IN DISTRICT COURT OF HENNEPIN COUNTY

COMPLAINT

The plaintiff complains of the defendant and alleges:

I

That the defendant is a corporation organized and existing under the laws of the state of New York on or about March 21, 1917; that from the time of its organization until on or about July 1, 1930, defendant was engaged in the securities business in Minnesota and other states selling and distributing corporate stocks and bonds, including its own corporate stock and that of The Chase National Bank of the City of New York; that on or about May 17, 1933, the name of the defendant was changed from "Chase Secur-

ities Corporation" to "The Chase Corporation" and that thereafter and on or about June 15, 1934, the name of the defendant was again changed from "The Chase Corporation" to "Amerex Holding Corporation"; that at all times the principal office and place of business of the defendant has been and it now is in the city of New York and state of New York.

[fol. 3]

II

That at all times hereinafter mentioned, defendant was actually engaged in the sale of securities, including its own stock and that of The Chase National Bank of the City of New York, within the state of Minnesota under a license issued to it as a broker by the Securities Division of the Department of Commerce of the state of Minnesota, which license was duly revoked, as plaintiff is informed and believes, on or about June 30, 1931; that said license was originally issued to said Chase Securities Corporation on or about March 22, 1928, and that from said date continuously to the 30th day of June, 1931, the defendant maintained offices within the state of Minnesota and engaged in such business therein through its agents and employees; that on or about June 30, 1931, the defendant discontinued the maintenance of its offices within the state of Minnesota and departed from this state and has ever since said date remained out of this state and had its legal residence in the state of New York.

III

That the defendant corporation was, in fact, organized by The Chase National Bank of the City of New York, a national banking association, hereinafter referred to as the bank, and its officers and stockholders, pursuant to an illegal plan whereby the capital stock of said Chase Securities Corporation was paid for by said bank and the shares of said Chase Securities Corporation issued directly to the stock-
[fol. 4] holders of the bank, each stockholder becoming a shareholder of record in the Chase Securities Corporation in direct proportion to his stock holdings in the bank; that under said plan, certificates of stock of both corporations, made out in the names of the respective stockholders were deposited with the Bankers Trust Company, a corporation, which issued a receipt covering the same number of shares in each corporation; that the stockholders in each corporation

were identical and remained identical and entered into and consented to an agreement forbidding the transfer of the bank stock without a simultaneous transfer of the stock of the Securities Corporation, and conversely forbidding a transfer of the stock of the Securities Corporation without a simultaneous transfer of the corresponding bank stock.

That the defendant, Chase Securities Corporation, was so organized, at the instance of said bank, its officers and shareholders, acting as such, to enable said bank to circumvent the federal statutes prohibiting a national bank to engage in business and stock operations or to buy, hold, or sell its own capital stock; that the organization and operation of defendant company was illegal and the defendant, in buying, holding, and selling bank stocks, including that sold to plaintiff as hereinafter alleged, engaged in banking, contrary to law and to the authority given it by its charter and usurped federal authority and otherwise violated the federal statutes prohibiting such transactions.

[fol. 5] IV

That as such broker in stocks and securities, the defendant held itself out to the plaintiff and other individuals in the state of Minnesota as and represented itself to be a member of the New York Stock Exchange and as expertly qualified to advise owners and holders of stocks and securities and prospective purchasers thereof of the intrinsic value of stocks and other securities being traded in by the public from time to time, and offered to give to the plaintiff and others confidential information and advice in respect to the purchase and sale by her of such stocks and other securities; that in all its dealings with the plaintiff herein referred to, the defendant purported to and agreed to act for the plaintiff in a fiduciary capacity as her agent and broker in the purchase and sale by her of stocks; that as such agent and broker the defendant owed the plaintiff the duty of acting with the utmost honesty and good faith toward the plaintiff and solely for plaintiff's benefit; and it was the defendant's further duty to advise the plaintiff fully of all the facts within its knowledge affecting all matters handled by the defendant for the plaintiff calculated to influence the plaintiff's opinion and judgment; that as such agent and broker, the defendant was in duty bound not to act adversely to the interest of the plaintiff by serving or

acquiring any private interest of its own in antagonism or opposition to the best interest of the plaintiff, and it was defendant's duty to act solely for the benefit of plaintiff and to further the plaintiff's interests even at the expense [fol. 6] of its own in all matters connected with the agency, and not to act on behalf of any adverse person, firm or corporation.

V

(a) That on or before the 8th day of August, 1929, the plaintiff opened an account with the defendant at its office in the city of Minneapolis, Minnesota, and engaged the defendant to act as her agent and broker in the purchase of certain securities; that the defendant then and there advised the plaintiff to purchase corporate stock of The Chase National Bank of the City of New York and of the Chase Securities Corporation and recommended and advised the plaintiff that such stocks were conservative investments and should within a very short period of time greately appreciate in value.

(b) That the defendant then and there fraudulently concealed from the plaintiff the fact that it was interested adversely to the plaintiff in the purchase of said stock by the plaintiff and others as herein alleged; that the defendant then and there falsely and fraudulently stated and represented to the plaintiff that the organization of said bank and securities corporation, and each of them, and the issuance or sale of said stock by them and each of them, was regular and legal, and concealed from plaintiff the nature and form of the organization of the said bank and securities corporation and the illegality thereof.

(c) That defendant then and there falsely and fraudu- [fol. 7] lently represented to the plaintiff that it, the defendant corporation, had complied with the laws of the United States and the laws of the state of Minnesota in soliciting plaintiff and offering said stocks, and each of them, for sale and in selling them, and that it was then and there duly licensed to offer to sell and to sell said stocks and all thereof, in the state of Minnesota, and that said stock, and all thereof, had been and was then duly registered for sale under and pursuant to the laws of the state of Minnesota, and fraudulently concealed from plaintiff that, in fact, defendant had not complied with said laws and

that it was not licensed to offer or sell said stocks within the state and that said stock had not been registered for sale within the state as required by the laws of Minnesota.

(d) That defendant then and there further represented and stated to plaintiff that said stock, and all thereof, was being sold by it, as an agent and broker for persons and corporations other than said bank and said defendant and not as owner thereof, and that it had no interest in said sale adverse to plaintiff, and that there was an actual bona fide and unmanipulated market for such stock at the price at which defendant then and there offered it to plaintiff, and that the sale of said stocks by defendant to plaintiff was legal, bona fide and genuine; that the defendant also fraudulently stated and represented to the plaintiff that the sale of said stock was being made by some third person in a so-[fol. 8] called over-the-counter transaction, in which the defendant was acting solely as a broker and as plaintiff's agent and not as a principal, and in which defendant was in no way interested either directly or indirectly, adversely to the plaintiff; that the defendant fraudulently concealed from plaintiff the fact that it was, in fact, adversely interested in said transaction and that the market for said stocks was fictitious and manipulated as hereinafter alleged and that said sale was not in fact a bona fide sale by a disinterested third person.

(e) That defendant then and there further represented and stated to plaintiff that The Chase National Bank of the City of New York was a national banking association with an authorized capital of $80,000,000.00 divided into 4,000,000 shares of a par value of $20.00 each, all of which shares were actually issued and outstanding, and that its capital was in no manner impaired and correctly set forth in financial statements issued by said bank from time to time, copies of which were shown to plaintiff by defendant at the time and place aforesaid.

(f) That defendant further represented and stated to plaintiff that its agent, one Weir Jopson, who solicited plaintiff, was a duly licensed agent of defendant and legally authorized to transact said business in the state of Minnesota.

[fol. 9]

VI

That relying upon said statements and representations, and upon such advice and recommendations by the defendant herein, and believing said statements and representations, and each of them, to be true and honestly made, and not otherwise and reposing trust and confidence in defendant, and without notice or knowledge of the facts concealed from her as aforesaid, plaintiff was induced to and did, on or about the 8th day of August, 1929, at the city of Minneapolis, Minnesota, purchase through and from the defendant eight (8) shares of the capital stock of The Chase National Bank of the City of New York and eight (8) shares of the capital stock of the Chase Securities Corporation, the defendant herein, at the agreed price of $1,828.00 for all of said shares, which sum the plaintiff then and there paid to the defendant; that the sales of the corporate stock of the two corporations named, to wit; The Chase National Bank of the City of New York and the Chase Securities Corporation, were made as part of the same sale, being evidenced by a receipt of the Bankers Trust Company reciting the deposit with said trust company of eight (8) shares of stock of said Chase National Bank of the City of New York and of the said Chase Securities Corporation, all under the terms of a pre-existing agreement between said corporations; that said corporate stocks in said corporations were linked together for public sale and holding in such manner as to require purchasers of shares of one corporation necessarily to purchase shares of the other; that subsequently [fol. 10] said stock was converted into eight (8) shares of the present stock of The Chase National Bank of the City of New York and eight (8) shares of stock of the Amerex Holding Corporation, defendant.

VII

(a) That such statements and representations so made by defendant to plaintiff, and each of them, were false and untrue, as defendant then and there well knew.

(b) That, in truth and in fact, the organization of defendant, Chase Securities Corporation, and the issuance of capital stock by it were irregular and illegal and fraudulently designed to evade and circumvent the laws of the United States and the laws of the state of Minnesota, as hereinbefore alleged.

(c) That, in truth and in fact, at the time of said sale, the defendant was soliciting and offering said stock for sale and selling the same within this state, directly to the public generaliy, including the plaintiff, in the course of continued and successive sales, and that the sale of said stock to said plaintiff was not an isolated transaction; that the defendant had not, in truth and in fact, registered said stock of the Chase Securities Corporation pursuant to Chapter 21-b of Mason's Minnesota Statutes 1927; that the stock of said Chase Securities Corporation was not within any classification of exempt securities provided for in said statute and [fol. 11] was not exempt from the operation of said statute by any of its provisions; that in truth and in fact, the defendant had not then applied and did not at any time thereafter apply to the securities division of the Department of Commerce in the state of Minnesota commonly known as the Securities Commission for the registration of its capital stock, nor did the defendant at any time ever notify said Commission of its intention to sell its said capital stock, and that it never did, in fact, secure a license from said Commission to sell, offer to sell, solicit or attempt to sell, or negotiate or dispose of its said capital stock; that said solicitation, offer of sale and sale to the plaintiff, without having obtained a license or permission from said Commission as provided by law for said reasons was illegal.

(d) That at the time of said transaction with plaintiff, and for a considerable time prior and subsequent thereto, the defendant was engaged in a vigorous and extensive campaign for the sale of said stock to the public for the secret purpose of creating a large clientele to whom the defendant could sell and distribute stocks, bonds and other securities from time to time at a profit; that defendant, during said period, was daily acquiring and disposing of large blocks of said bank stock; that said Chase National Bank, as well as the defendant, were in truth and in fact interested in the sale of said stock to the plaintiff, said sale being one of a long series of like sales made by the defendant and said Chase National Bank contrary to the provisions of the [fol. 12] federal statutes forbidding national banking associations to purchase, hold and of sell their own capital stock; that at the time of said sale to the plaintiff and for a long period of time both prior and subsequent thereto, said Chase National Bank, together with the defendant Chase

Securities Corporation, and the respective officers of said corporations, were engaged in extensive speculative ventures in the capital stock of said corporations, and in the course thereof took substantial speculative positions, both long and short, in said stock and participated in syndicates and pool accounts therein, all contrary to law; that all of the aforesaid facts and activities of The Chase National Bank and the defendant herein were fraudulently concealed by the defendant from the plaintiff; that in furtherance of the aforesaid plan and campaign, defendant directed its agents, servants, and employees throughout the United States, and particularly in the state of Minnesota, to find purchasers for its stock and thereby create a larger clientele for itself, and the defendant offered to and did pay to its own agents, servants and employees a substantial commission to induce said agents, servants and employees to make sales of said bank stock in said Chase Securities Corporation to the plaintiff and others in direct violation of its fiduciary relationship to the plaintiff herein.

(e) That, at the time of the transaction herein referred to, the defendant was a member of a pool organized by it and several other dealers in securities and had agreed with [fol. 13] such other dealers to actively trade in the stock of The Chase National Bank and the Chase Securities Corporation for the purpose of raising the price thereof by concerted activity on the part of the pool members, and thereby enable them to unload the holdings of stock at a profit from the public attracted by the activity and by information disseminated about the stock, all of which facts were concealed from the plaintiff herein; that at the time of the sale of said stock to the plaintiff herein and for some time prior thereto, the defendant and other members of said pool were trading actively in said stocks and manipulating the market price thereof and were from time to time unloading their holdings upon members of the public, including the plaintiff, at a large profit and were creating a fictitious market price for said stock; that, by the activities of the defendant and other members of said pool, a false and deceptive appearance of genuine demand for the securities on the part of the purchasing public was created and the plaintiff was induced to purchase said stock upon such misleading appearance so fraudulently created; that, by secretly participating in such pool agreement, the defendant violated its

fiduciary relationship which it bore to the plaintiff and other customers; that the defendant, without the knowledge or consent of the plaintiff herein, had a personal pecuniary interest in said pool account and had other interests adverse to the plaintiff, the defendant as a member of said pool being under obligation to its co-participants to operate and [fol. 14] manage the pool in a manner consonant with their best interests irrespective of the best interest of the plaintiff and defendant's other customers; that, in its dealings with the plaintiff, the defendant, by reason of its membership in said pool and by reason of its interest as principal in the sale of said stock, was representing interests adverse to the plaintiff.

(f) That, in truth and in fact, the actual number of shares of stock of The Chase National Bank of the City of New York, legally issued and outstanding, was materially less than 4,000,000, many of said shares having been illegally issued and sold by said defendant and said bank contrary to "Blue Sky" laws of Minnesota and other states and under circumstances making the issuance and sale thereof absolutely void; that large blocks of said shares were at the time held by an illegal pool, participated in by said bank and defendant corporation as hereinbefore alleged, and did not constitute stock actually issued and outstanding; that the financial statements of said bank shown by defendant to plaintiff were false and untrue in that they represented as stock, actually issued and outstanding, the above mentioned stock illegally sold under circumstances rendering the sales thereof void, and the stock then and there held by "illegal pools," in which defendant and said bank and their respective officers and agents participated.

(g) That said Weir Jepson, defendant's agent, who solicited plaintiff, was, in fact, not licensed as such by the [fol. 15] state of Minnesota and its Securities Commission.

(h) That all of the aforesaid facts were then and there fraudulently concealed, and withheld by defendant from plaintiff, in direct violation of defendant's duty to plaintiff.

VIII

That by reason of the illegality of the sale of said stock to plaintiff as hereinbefore alleged, and the fraud, concealment and breach of fiduciary relationship on the part of

defendant, said sale of stock by defendant to plaintiff was absolutely void.

IX

That the plaintiff did not discover the defendant's breach of its fiduciary relationship with the plaintiff as hereinbefore set out, nor the adverse interest of the defendant in the transaction hereinbefore referred to, nor the falsity of the defendant's statements and representations, or any of them, to her, nor any of the fraudulent and illegal acts of defendant herein nor any of the facts concealed and withheld from her by defendant as herein alleged until after the 1st day of June, 1935, and within six years prior to the commencement of this action, notwithstanding due diligence on the part of plaintiff.

[fol. 16]

X.

That plaintiff has heretofore tendered to the defendant a return and delivery of the certificates representing the shares of stock in each of said corporations so offered and sold to her as aforesaid and has tendered and offered to return and repay to the defendant, with interest, any dividends received by the plaintiff upon said shares of stock and any other rights procured by her as stockholder in said corporation since the sale to her of said stock as aforesaid; that the defendant refused said tender and refused to accept the return of said stock and dividends, rights and interest; that plaintiff hereby again tenders to the defendant the return and redelivery of said stocks evidenced by said certificates and offers to return and repay to the defendant any and all dividends, rights or other income received by her thereon from the date of her purchase thereof, all with interest; that plaintiff has heretofore offered and does hereby offer defendant to pay all costs incident to the transfer of said stock to the defendant and to comply with any other just and reasonable conditions imposed by the court as a condition to the relief herein prayed for.

XI

That by reason of said fraudulent misrepresentations and concealment, and by reason of defendant's wrongful and unlawful conduct in the sale by it to plaintiff of said securities, plaintiff has been damaged in the sum of $1,828.00, together with interest from and after August 8, 1929.

[fol. 17-44] Wherefore, plaintiff demands judgment against the defendant in the sum of $1,828.00 with interest thereon at the rate of 6% per annum from the 8th day of August, 1929, together with the costs and disbursements of this action.

T. O. Streissguth, Attorney for Plaintiff, New Ulm, Minnesota.

In District Court of Hennepin County.

Special Appearance Reserving Objections and Exceptions to Jurisdiction, and Answer.

Comes now the defendant, appearing specially and not generally, for the sole and single purpose of now objecting and excepting and reserving all former objections and exceptions to the jurisdiction of the court and alleges:

I

That on or about the 13th day of December, 1937, defendant, appearing specially and not generally, for the sole and single purpose of objecting to the jurisdiction of the court, did serve upon plaintiff a notice and motion in writing to quash and set aside the service of the summons and complaint made upon the Commissioner of Securities and the [fol. 46] Secretary of State in this action, under and pursuant to authority alleged to have been vested in said officials by the statutes of the state of Minnesota, and powers of attorney filed pursuant thereto. That said motion was heard on December 22, 1937, by the court, the Honorable Mathias Baldwin, judge thereof. That after the hearing of said motion, and on or about the 23rd day of December, 1937, said court made and filed its order denying the defendant's motion and overruling the objections of defendant to the jurisdiction of the court, and extending to defendant an exception to the court's ruling therein; that therein the court also extended to defendant 20 days from the date of the filing of said order within which to answer.

II

That upon the aforementioned special appearance, defendant did interpose numerous objections to the jurisdiction

of the court, which said objections are contained within defendant's motion in writing which is on file and of record in the office of the clerk of said court, and which, said objections, are incorporated herein by reference.

That subject to each and all of said objections to the jurisdiction of the court, and reserving exception to the ruling of the court denying defendant's motion to quash and set aside the service of the summons and complaint and overruling the objections of defendant to the jurisdiction of the court, defendant interposes the following answer to the causes of action set forth in the complaint.

[fol. 47] ANSWER

I

Admits that at or about the time alleged by plaintiff in her complaint, defendant was a corporation organized under the laws of the state of New York, with its principal office and place of business in the city of New York, and alleges that it now is and continuously up to the present time was a corporation so organized and existing, and alleges that the corporate name of the defendant has been changed from that of the Chase Securities Corporation to that of The Chase Corporation, and thereafter to the name of Amerex Holding Corporation, which is the present name of said corporation.

II

In answer to paragraph II, defendant denies that it was engaged in the sale of securities in Minnesota, but alleges that a broker's license was issued to defendant on or about March 22, 1928, by the Securities Division of the Department of Commerce of the state of Minnesota, which said license was annually renewed until July 7, 1931, at which time it was cancelled at the instance and request of defendant; that as part of its original application for a broker's license, the defendant executed and filed a power of attorney appointing the Commissioner of Securities as its attorney for service of process in an action or proceeding in which the defendant may be a party in relation to or involving a transaction covered by Chapter 192, General Laws of Minne-
[fol. 48] sota for 1925, popularly known as the Securities Act or Blue Sky Law. Defendant further alleges that it was licensed and authorized to transact business as a foreign

corporation on June 5, 1930, under Sections 7493-7495 of Mason's Minnesota Statutes 1927. That on June 30, 1931, defendant, pursuant to Section 7494 of Mason's Minnesota Statutes 1927, did withdraw from Minnesota, revoke the appointment of its agent in this state, and did appoint the Secretary of State of Minnesota its agent to receive legal process in any action or proceeding of any kind arising out of or involving anything done or omitted by said defendant in the state of Minnesota, while licensed to do business therein.

III

In answering paragraph III, defendant denies each and every allegation, matter, and thing, and each and every part thereof, except as hereinafter qualified or explained.

Defendant alleges that the Chase Securities Corporation was organized pursuant to an agreement entered into on or about March 21, 1917, by and between all of the stockholders of The Chase National Bank of the City of New York (sometimes hereinafter referred to as the bank) among themselves, a committee of such stockholders and the Bankers Trust Company of New York. That in said agreement, among other things, the aforesaid committee was authorized to undertake the organization of said Chase Securities Corporation under and pursuant to the laws of the state of New [fol. 49] York and was authorized to subscribe, on behalf of each stockholder of the bank becoming a party to said agreement, for a number of shares of stock of said Chase Securities Corporation equal to the number of shares which such stockholder then held in the bank and was authorized to deposit the certificates for shares of stock of the bank together with the certificates for shares of stock if, as and when issued and subscribed for, of said Chase Securities Corporation, with said Bankers Trust Company, and said Bankers Trust Company agreed to hold said certificates, and issue, as evidence of deposits, receipts of said Bankers Trust Company in form provided for in said agreement, evidencing the deposit by the respective owners thereof, and the underlying certificates for shares of stock of the bank and of said Chase Securities Corporation were to remain on deposit in accordance with the agreement until the termination thereof; that said receipts provided that the certificates of stock of the bank and of said Chase Securities Corporation were transferable only on presentation of the

receipt to said Bankers Trust Company duly assigned, and said Bankers Trust Company, in turn, was authorized to obtain transfer of the underlying certificates of stock of the bank and of said Securities Corporation on behalf of the holder of the receipt and receive and hold the same for the transferee under and subject to said agreement; it was further understood and agreed that shareholders of the bank would not transfer their shares of the stock of the bank without at the same time transferring to the same per- [fol. 50] son an equal number of shares of stock of said Securities Corporation. That it was also provided in the certificate of incorporation of said Chase Securities Corporation, among other things, that the shareholders of that corporation would not transfer their shares of stock of that corporation without at the same time transferring to the same person an equal number of shares of stock of the bank; that, in the performance of the agreement, the underlying certificates for shares of stock of the bank and of said Chase Securities Corporation were deposited with said Bankers Trust Company, and Bankers Trust receipts were issued to the owners entitled thereto.

Defendant alleges that by agreement dated January 15, 1930, between the stockholders of the bank and of defendant, a majority of the directors of defendant, and said Bankers Trust Company as depository, said deposit agreement of 1917 was amended so as to terminate as of June 2, 1930, the arrangement with regard to the issuance of receipts by said Bankers Trust Company, as hereinbefore referred to, and to provide for the issuance in lieu thereof, on or after June 2, 1930, to holders of such receipts, stock certificates in the form containing upon one side thereof a certificate representing shares of stock of the bank and upon the reverse side thereof a certificate representing an equal number of shares of stock of defendant, and that by the terms of said agreement, stock of the bank and defendant were assignable and transferable only together, and in such manner that any [fol. 51] transfer of shares in either corporation would ipso facto transfer to the same transferee the same number of shares in the other corporation.

That on or about June 15, 1934, said agreement of 1917 was terminated; that at or about the same time, the certificate of incorporation of the Securities Corporation was amended by eliminating the provisions requiring sharehold-

ers of said corporation to be shareholders of the bank and forbidding transfer of shares of the Securities Corporation without at the same time transferring to the same person an equal number of shares in the bank; that the name of said Securities Corporation was changed to the Amerex Holding Corporation. Thereafter, separate certificates representing shares in the bank were issued, as well as separate certificates in said Amerex Holding Corporation.

IV

In answer to paragraph IV, defendant denies each and every allegation, matter, and thing, and each and every part thereof.

V

In answer to paragraph V, defendant denies each and every allegation, matter, and thing, and each and every part thereof.

VI

In answer to paragraph VI, defendant alleges that on or about August 12, 1929, a salesman of defendant, duly licensed under the Securities Act of Minnesota, received from [fol. 52] plaintiff an order for eight (8) shares of the capital stock of The Chase National Bank of the City of New York and an equal number of shares of defendant, represented by a receipt of the Bankers Trust Company of the nature and form hereinbefore described in paragraph III; that immediately on receipt of said order, it was transmitted to defendant's Chicago office. That shortly thereafter the purchase price for said security was received by defendant in due and regular course of mail at defendant's Chicago office; that shortly thereafter, defendant's Chicago office received the said receipt representing said shares of the stock of the bank and defendant ordered by plaintiff; that pursuant to plaintiff's instructions, said receipt was enclosed in an envelope addressed to plaintiff, and was placed in due and regular course of registered mail by defendant's Chicago office. Defendant denies that said transaction was made and consummated in the state of Minnesota, but alleges that it was made and consummated outside the said state.

Defendant alleges that plaintiff exchanged the said Bankers Trust Company receipt on or about November 6, 1920,

for a certificate representing the said shares of stock of the bank upon one side and, upon the reverse side, representing an equal number of shares of defendant which said last mentioned certificate may be called a "duplex" certificate for convenience; that on or about August 12, 1936, said duplex certificate was exchanged for a separate certificate [fol. 53] representing shares in the bank, and a certificate separate and distinct from the bank certificate, representing shares in the Amerex Holding Corporation.

VII

In answer to paragraph VII, defendant denies each and every allegation, matter, and thing, and each and every part thereof.

VIII

In answer to paragraph VIII, defendant denies each and every allegation, matter, and thing, and each and every part thereof.

IX

In answer to paragraph IX, defendant denies each and every allegation, matter, and thing, and each and every part thereof.

X

Except as hereinbefore admitted, qualified, or denied, defendant denies each and every allegation, matter, and thing in plaintiff's cause of action in her complaint contained, and each and every part thereof.

XI

As further separate and affirmative defenses, defendant alleges:

1. That the transaction giving rise to plaintiff's alleged cause of action arose out of a transaction which was made and consummated outside of the state of Minnesota; that [fol. 54] the securities statutes and other laws of the state of Minnesota have no application to said transaction; that in so far, if at all, as said securities statutes and other laws of Minnesota may be construed to apply to the transaction between plaintiff and defendant, and, in so far, as said statutes may nullify and make void the shares of plaintiff, then said statutes and laws are unconstitutional, in that they

deprive defendant of its property without due process of law, in violation of the provisions of Section 7, of Article 1, of the Constitution of the State of Minnesota, and of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

2. That the transaction between plaintiff and defendant was a transaction directly in interstate commerce to which the securities statutes and other laws of the state of Minnesota have no application; that in so far, if at all, as said statutes and laws be deemed applicable to said transaction, then said statutes are unconstitutional and void as being in contravention of Section 8, Article 1, of the Constitution of the United States of America, which confers upon Congress of the United States the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

3. That the shares of stock of The Chase National Bank of the City of New York were exempt from the securities statutes of the state of Minnesota and more particularly the [fol. 55] registration provisions thereof, as being the stock of a national banking association created and existing by act of Congress of the United States and subject to the supervision or regulation of the government of the United States; that the exempt character of said bank stock extended to the stock of said Chase Securities Corporation and the receipts evidencing the deposit of the stock of both corporations.

4. Alleges that the agreement set out in paragraph III of this answer was entered into and executed and became effective, and defendant was organized prior to June 21, 1917, which was a time prior to the effective date of the first securities statutes of the state of Minnesota, which said statutes did not take effect until July 1, 1917. That in so far, if at all, as said first securities statutes and/or subsequently enacted securities acts of the state of Minnesota apply to said transaction between defendant and plaintiff, then said acts are unconstitutional, null, and void, in that they impair the obligation respecting the simultaneous transfer of the shares of stock of the bank with the shares of stock of said Chase Securities Corporation of said agreement between the stockholders of the bank and of the cer-

tificate of incorporation of said Chase Securities Corporation in contravention of Section 10, Article 1, of the Constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts, and Section 11, of Article 1, of the Constitution of the State of [fol. 56] Minnesota, providing that no law shall ever be passed impairing the obligation of contracts.

5. Alleges that plaintiff's cause of action, if any, did not accrue within six years before the commencement of this action, and is barred by the statute of limitations.

6. Alleges that on or about the time the plaintiff received the securities representing ownership of stock in the bank and said Chase Securities Corporation, and within six years of the date of the transaction, she knew or was in the possession of knowledge putting her upon notice of all material facts relating to the registration of said stock with the Department of Commerce, Securities Division, of the state of Minnesota and the requirements of the securities statutes (popularly described as the Blue Sky Law) of the state of Minnesota, and the other matters of complaint alleged by plaintiff in the complaint. That information respecting the registration or lack of the same was a matter of public record easily available to plaintiff. That plaintiff was in possession of the knowledge of the affiliation agreement and the contract relationship existing between the bank and the Chase Securities Corporation, the essential terms and provisions of which were set forth in summary form upon the said security. Plaintiff was also in possession of all facts with respect to the nature and condition of the market and the facts and circumstances relating to her alleged purchase. That plaintiff knew that she could easily and quickly secure any information with respect to the sale [fol. 57] of her stock and that the public records were open to her for consultation in the office of the Department of Commerce, Securities Division, of the state of Minnesota. That plaintiff is and was at all times material a person of experience in business and financial matters, and entirely capable of ascertaining the facts about this purchase of which she complains and looking after her business affairs. That at, and for some time after the delivery and acceptance of said securities, the market value was greatly above the market value at the time of the commencement of this

action, and that plaintiff has delayed questioning of the validity of said transaction and bringing this action until a time when the market value of the stock has greatly decreased, although said stock is not without market value, and has been guilty of such laches that she is estopped from maintaining this action.

7. That with full knowledge of all material facts connected with or relating to the alleged transaction of purchase and with the knowledge of facts putting her on notice of all material facts pertaining to the sale of said stock, the nature and extent of defendant's authority under the Minnesota Securities Acts, the legality of said sale, and the character of the market in which she purchased said stock, plaintiff duly ratified and confirmed and in all respects elected to consider the transaction valid by receiving, accepting, and retaining pecuniary benefits resulting [fol. 58] therefrom, by exchanging the original certificates received by her for new forms of certificates, by voting at the meetings, and otherwise by her conduct evidencing her election to ratify, and confirm the alleged purchase.

8. Defendant denies that plaintiff has made, or can make, a valid and sufficient tender as alleged in paragraph X of plaintiff's complaint, or otherwise. Defendant further alleges that plaintiff is unable to tender and return the same stock and stock carrying with it the same rights, duties, privileges, and obligations or its equivalent in either the bank or said Chase Securities Corporation, as that purchased by plaintiff by reason of fundamental changes in the corporate structures of both corporations, which, said changes, were as follows:

(a) That on or about August 12, 1929 (the date of plaintiff's alleged purchase), the bank was a national banking association organized under the banking laws of the United States of America, having a capital of eighty million dollars ($80,000,000) divided into four million (4,000,000) shares of stock of a par value of twenty dollars ($20.00) per share. At or about the same time, the Chase Securities Corporation had a capital of sixty-six million seven hundred fifty thousand dollars ($66,750,000) represented by four million (4,000,000) shares without par value.

(b) On or about August 14, 1929, the number of shares of stock of Chase Securities Corporation was increased to

[fol. 59] five million two hundred fifty thousand (5,250,000) shares without par value.

(c) On or about August 23, 1929, the capital of Chase Securities Corporation was further increased to sixty-nine million two hundred fifty thousand dollars ($69,250,000), and on or about August 24, 1929, said capital was further increased to seventy-three million dollars ($73,000,000).

(d) On or about August 24, 1929, the capital of the bank was increased to one hundred five million dollars ($105,000,000) and one million two hundred fifty thousand (1,250,000) additional shares of the par value of twenty dollars ($20.00) each were issued, thereby increasing the number of shares of stock of the bank to five million two hundred fifty thousand ($5,250,000).

(e) On or about May 31, 1930, the Equitable Trust Company of New York, and the Interstate Trust Company of New York, merged and consolidated with the bank and the capital of the bank was increased to one hundred forty-eight million dollars ($148,000,000) and the number of shares of stock was increased to seven million four hundred thousand (7,400,000) of the same par value. At or about the same time changes were made in said Chase Securities Corporation; its capital being increased to ninety-five million dollars ($95,000,000) and the number of shares increased to seven million four hundred thousand (7,400,000) without par value.

(f) On or about January 14, 1932, the capital of said [fol. 60] Chase Securities Corporation was reduced to forty million dollars ($40,000,000) without changing the number of shares outstanding.

(g) On or about January 11, 1933, the capital of said Chase Securities Corporation was reduced to thirty-seven million dollars ($37,000,000) and the shares of stock were changed from shares without par value to shares of the par value of five dollars ($5.00) each.

(h) On or about May 17, 1933, the certificate of incorporation of defendant was duly amended so as to provide that after May 16, 1933, defendant should not, either directly or indirectly through any subsidiary, engage in the business of issuing, floating, underwriting, publicly selling or distributing at wholesale or retail, or through syndicate partic-

ipations, stocks, bonds, debentures, notes or other securities, provided that such limitation should not preclude defendant from selling, liquidating or otherwise realizing upon any investment theretofore made. Thereupon the defendant became, and still is, a holding and liquidating company only. The par value of defendant's shares was at the same time reduced from five dollars ($5.00) to one dollar ($1.00) per share and the capital of defendant was reduced from thirty-seven million dollars ($37,000,000) to seven million four hundred thousand dollars ($7,400,000) and the name of the corporation was changed from "Chase Securities Corporation" to "The Chase Corporation."

[fol. 61] (i) On or about March 15, 1934, the capital of the bank was increased to one hundred fifty million two hundred seventy thousand dollars ($150,270,000) which was accomplished by decreasing the then capital from one hundred forty-eight million dollars ($148,000,000) to one hundred million two hundred seventy thousand dollars ($100,270,000) par value of common stock, by reducing the par value of the outstanding shares of common stock from twenty dollars ($20.00) to thirteen dollars and fifty-five cents ($13.55) each, and increasing the capital by the issuance of fifty million dollars ($50,000,000) of five per cent (5%) cumulative preferred stock divided into two million five hundred thousand (2,500,000) shares at the par value of twenty dollars ($20.00) per share. That in connection with the authorization of the issuance of said preferred stock, the articles of association of the bank were amended to provide, among other things, as follows: The holders of preferred stock were not to be liable for assessments to restore impairments in capital and were entitled to receive, in preference to the holders of common stock, cumulative dividends out of net profits of the bank at the rate of 5% per annum. The holders of preferred stock were entitled to the benefit of the provisions of a sinking fund for the retirement of the preferred stock at stated intervals. Each holder of preferred stock as well as of common stock was entitled to one vote for each share of stock, except that cumulative voting for directors was permitted. In case two dividend payments on the preferred stock should be [fol. 62] in arrears or there should be default in the sinking fund provisions, the holders of preferred stock as a class were entitled to vote twice the number of votes to which the

holders of common stock as a class were at the time entitled. In the event of liquidation the holders of preferred stock were entitled to priority in payment of the par value of said stock plus accrued dividends.

(j) On or about June 15, 1934, the affiliation between the bank and said The Chase Corporation was terminated by the amendment of the certificate of incorporation of said The Chase Corporation eliminating the provision requiring shareholders of said The Chase Corporation to be shareholders of the bank and forbidding transfer of shares of stock of said The Chase Corporation without at the same time transferring to the same person an equal number of shares of stock of the bank. On or about said date said agreement of March 21, 1917, entered into by and between the stockholders of the bank as aforesaid, was terminated. At the same time the par value of each share of stock of said The Chase Corporation was increased from one dollar ($1.00) to ten dollars ($10.00) and the number of shares outstanding was reduced from seven million four hundred thousand (7,400,000) to seven hundred forty thousand (740,000) and the name of the defendant was changed from "The Chase Corporation" to "Amerex Holding Corporation."

(k) The preferred stock was called for redemption on [fol. 63] August 1, 1936, with the option to the preferred stockholders of securing redemption of said stock at any time after June 17, 1936.

That the changes described in the above paragraphs number (b) to (j), both inclusive, excepting (c) were in each case approved at and accomplished after a meeting of stockholders of the corporation involved in the change, called for such purpose, notice of which meeting and of the proposed changes was in each case given to all stockholders of the corporation involved, including the plaintiff herein as long as the plaintiff continued to be a stockholder of record. That plaintiff had full opportunity to appear at said meetings in person or by proxy and vote for or against said proposals or otherwise register approval or disapproval thereof.

Wherefore, defendant prays judgment that plaintiffs take nothing for their alleged causes of action, and that defend-

ant have judgment dismissing said action and for its costs and disbursements herein.

Dated this 12th day of January, 1938.

Stinchfield, Mackall, Crounse, McNally & Moore, Attorneys for Defendant, 1100 First National-Soo Line Building, Minneapolis, Minnesota.

[fol. 64] In District Court of Hennepin County

Reply

For her reply to the answer of the defendant herein, the plaintiff:

I

Alleges that at all times alleged in the complaint, a confidential and fiduciary relationship, to-wit: that of broker and customer, existed between the defendant and the plaintiff; that as such broker, it was defendant's duty to advise the plaintiff fully of all facts within its knowledge affecting the matters alleged in the complaint; that notwithstanding the aforesaid relationship and the duty of the defendant as hereinbefore alleged, the defendant willfully and fraudulently and for the purpose and the intent of concealing from the plaintiff her respective rights and cause of action alleged in the complaint, and particularly the facts alleged in paragraphs III and VII of said complaint, prevented the plaintiff from obtaining knowledge of the facts alleged in the complaint and fraudulently concealed from the plaintiff the facts rendering void the sales of stock by the defendant to the plaintiff referred to in the complaint; that because of said fraud and concealment on the part of the defendant by which the plaintiff was misled, she did not discover the facts giving rise to her cause of action herein until shortly prior to the commencement of this action and within the statutory period of limitations prior to the commencement of the action, notwithstanding due diligence on her part.

[fols. 65-80]

II

Except as hereinbefore admitted, qualified or expressly denied or as the same admits the allegations of plaintiff's

complaint, plaintiff denies each and every allegation of said answer and each and every part thereof.

T. O. Streissguth, Attorney for Plaintiff, New Ulm, Minnesota.

[fol. 81] In District Court of Hennepin County

Settled Case

This case came regularly on for trial before Hon. Winfield W. Bardwell, one of the judges of the above named court, without a jury, on the morning of May 9, 1939. T. O. Streissguth, Esq., and Hyman Edelman, Esq., of the firm of Messrs. Leonard, Street & Deinard, appeared for plaintiff; and F. H. Stinchfield, Esq., and John M. Palmer, Esq., of the firm of Messrs. Stinchfield, Mackall, Crounse & Moore, appeared for defendant.

Colloquy

Mr. Palmer: Before a jury is examined in this case I have a couple of preliminary motions that I would like to get out of the way. I have requested a jury of six in this action.

Mr. Streissguth: If there is to be a jury trial, your Honor, we want a jury of twelve.

Mr. Palmer: My request of six stands.

[fol. 82] The Court: Counsel, I suppose, has the right to twelve jurors.

Mr. Palmer: Now, the first matter that I would like to dispose of before the jury is examined is the matter of renewing again our objections to the jurisdiction in this case. The defendant has appeared specially here and has objected to the jurisdiction of the court. The defendant's motion was overruled, I think, by Judge Baldwin. Now, in order to preserve our record for the purposes of appeal, and save our special appearance, we want to renew our objections and save our exceptions so that the record will show the defendant is appearing here and contesting on the merits subject to its special appearance.

The Court: The record may show that.

Mr. Palmer. Now, the next matter, your Honor, the defendant moves to compel the plaintiff to elect between

two inconsistent causes of action. From the complaint it seems to us that the plaintiff is relying upon two inconsistent causes of action. These causes of action are pleaded in the complaint without any differentiation between them. One cause of action is this, the plaintiff alleges that she employed the defendant as her agent and broker to buy eight shares of the stock of The Chase National Bank and the Chase Securities Corporation. It is then alleged, your Honor, that the defendant violated its fiduciary duties growing out of that agency relationship. Some respects in which this agency relationship are alleged to have been violated are these, paying secret commissions to agents, by [fol. 83] putting on a concerted campaign to dispose of the stock, and by participating secretly in a trading account with other dealers for the purpose of raising the price of the stock. This all appears clearly from paragraphs 4, parts of 5, parts of paragaph 6, and parts of paragraphs 7 and 9. I will not take the time at this point to read those paragraphs of the complaint.

Now, after alleging that the contractual relationship here between the plaintiff and defendant was that of principal and agent, or broker and customer, plaintiff does a complete about face and alleges that the contractual relationship between the parties is that of seller and buyer, that the defendant was the seller of this stock and that the plaintiff was the buyer of the stock. This is all clearly shown in paragraphs 1, 2, 4, 6 and 7 of the complaint. Now, the inconsistency, the ambiguity, or the straddle between a contract of agency and a contract of sale is well illustrated by paragraph 6 of the complaint. In paragraph 6 the plaintiff says that relying upon said statements and representations, and upon such advice and recommendation by the defendant herein, and believing said statements and representations, and each of them, to be true, and honestly made, and not otherwise, and reposing trust and confidence in defendant, and without notice or knowledge of the facts, concealed from her as aforesaid, plaintiff was induced to and did on or about the 8th day of August, 1929, at the city of Minneapolis, Minnesota, purchase through and from the defendant eight shares of the capital stock of The Chase [fol. 84] National Bank of the City of New York, and eight shares of the capital stock of the Chase Securities Corporation. Paragraph 6 continues on, but I believe that is sufficient because it shows the material portions about which

we are raising a question this morning. In other words, your Honor, we have here, first, the claim that the defendant and the plaintiff were contractually related to each other by a contract of agency; then the plaintiff turns around and claims that that contract was a contract of sale. What the parties said and what the parties did to perform this contract gives rise to the relationship of seller and buyer. Now, we do not believe that these two relationships can stand together. They are inconsistent. One cancels out the other. We believe the defendant has a right to know what the contractual relationship is that the plaintiff intends to rely on in proving her case. So we move that the plaintiff be compelled to allege whether she is going to stand on the cause of action based on the contract of sale, or whether she is going to stand on a cause of action based upon a contract of agency, or so-called broker and customer relation.

Mr. Streissguth: May it please the court, I assume that this court is to some extent familiar with these cases, having tried the first one back in 1935, the case of Benjamin Segal against the Chase Securities. Since that time a great number of cases have been tried, the cases in the state courts and the cases in the federal courts. In order that the court may understand exactly what our contention is [fol. 85] in this case, as it was in the other, I want to just briefly refer to the allegations of the complaint and some authorities. It is true, as Mr. Palmer said, that the complaint sets forth in the first instance that the defendant was a broker in stocks and securities, and that it held itself out to the plaintiff, I am reading from paragraph 4, as being expertly qualified * * *.

The Court: As I understand, chiefly, your cause of action or your claim here is fraud. The alleging of this fiduciary relationsip between the defendant and plaintiff is more or less of a recital, is that the idea?

Mr. Streissguth: I think that is a fair statement, yes.

The Court: You are relying upon fraud?

Mr. Streissguth: Upon fraud, and upon a violation of the statute in the sale, a violation of the Blue Sky Law, and upon fraud in the sale.

The Court: I suppose that particular question wouldn't be a question for the jury, would it?

Mr. Streissguth: Well, I am just wondering what issue Mr. Palmer wants to submit to the jury. The big question in this case, we anticipate, will be the question of the statute

of limitations, and that involves the construction of Section 9200 of our statutes which relates to the removal of the defendant from the state. In this case we claim that the defendant having removed from the state in 1931 cannot claim the benefit of the statute. The statute was tolled.

The Court: I notice from the pleadings that would be a [fol. 86] question.

Mr. Streissguth: The statute was tolled, and the question whether it is a fraud action in which the cause of action arises upon discovery. Those are the two methods that we——

The Court: The question of registration is probably a matter of law, isn't it? Don't you figure that, Mr. Palmer?

Mr. Palmer: I didn't hear, your Honor.

The Court: The question of whether this comes within the Blue Sky Law is a question of law rather than a question of fact?

Mr. Palmer: There is no question about that, your Honor.

The Court: So perhaps the jury would only answer one interrogatory, and that is the question of whether there was or wasn't fraud.

Mr. Palmer: I think that is right, your Honor, that would be the only question of fact for the jury.

The Court: And the court would make findings based upon the answer to the interrogatory, and the question of law applicable, whether or no this stock was registered under the Blue Sky Law, and then probably the question of law as to whether the statute has been tolled.

Mr. Palmer: I think that is right, your Honor, but I have been proceeding upon the assumption here in the preparation of this case for trial that the cases establish and I believe quite conclusively, that a Blue Sky action is outlawed. Of course Mr. Streissguth has a good many cases [fol. 87] which he relies upon which he claims shows the contrary. I have a little memorandum here which doesn't pretend to be exhaustive, which sets out some of the cases which we rely upon to establish that, and particularly Minnesota cases.

The Court: I wonder whether it would be wise to take up and thresh out the question of law before we determine the questions of fact here.

Mr. Streissguth: It took us three days to argue the question of law before Judge Joyce.

The Court: Well, we have to meet it some time, probably.

Mr. Streissguth: We have decisions in the cases tried in Minnesota, which we would be glad to give to the judge.

The Court: I have in mind this, it will probably take a day or two to try the issue of fact here. If the court should hold against the plaintiff on the questions of law that two days probably would be more or less wasted. I haven't any opinion one way or the other. I am perfectly willing that counsel should proceed as they care to.

Mr. Palmer: I don't want to take up the time of the court unnecessarily, your Honor. And secondly, if counsel for the plaintiff are relying here primarily upon a violation of the Blue Sky Law, and so-called implied fraud, and so-called tolling of the statute of limitations, then I say a jury should not be brought into the case because there really isn't anything for them to decide. There is really no fraud to be determined. There is no question of fact to go to the jury. If that is the situation, why, we are perfectly willing to [fol. 88] waive a jury.

Mr. Streissguth: I will say this very frankly to you, Mr. Palmer, and to the court, that so far as representations as to the registration of the stock is concerned, we will not rely upon express representations as to registration. We claim that there was fraud by implied representation as to registration. We further claim that there was concealment in connection with the pooling operations and manipulation of the market. We expect to go into the question of manipulation of the market; expect to show the pools. But so far as any claim that there was any express representation within Minnesota, that will not be claimed.

Mr. Palmer: Under those circumstances, then, your Honor, it seems to me we have then at least as one of the questions in this case a question of fraud. In my judgment there could be no concealment which would give rise to any cause of action unless there was first established a fiduciary relationship between the parties, the relationship of broker and agent. Now, that question of agency may be a question of fact, although I don't think so. I will say this, that if counsel for plaintiff will take the definite position that the relationship here between the parties was buyer and seller, then I think the issue of fact is largely out of the case, and we can try it, saving time, saving trouble of a jury. We are perfectly willing to waive it.

The Court: I should judge that perhaps the difficult problems to meet here are more or less questions of law. I [fol. 89] think there is no claim, as I remember the other case, that there was any registration of the stock.

Mr. Palmer: That is right, your Honor.

The Court: That brings up the question if implied fraud, which is a question of law.

Mr. Palmer: Yes.

The Court: The question of laches is another question of law, I suppose, and those facts can be more or less agreed upon, the time the defendant moved out of the state, and whether or not that tolls the statute.

Mr. Palmer: That is a question of law.

The Court: Of course, if that is determined adversely to the plaintiff, that ends the lawsuit. If it doesn't, of course then the question of fraud is probably a question of fact.

Mr. Palmer: This so-called question about the fiduciary relationship is probably a question of fact in the case unless counsel is willing to elect upon what kind of a contract he is going to rely in this case. And that question, I believe, permeates the whole action. If the contractual relationship between the parties here was that of broker and principal, and if the Chase Securities Corporation was employed as the plaintiff's broker to buy the securities for the account of the plaintiff, then a violation of the Securities Act is not involved.

Mr. Streissguth: Unless they sold their own stock.

Mr. Palmer: If they turned around after the establishment of that relationship and violated it, possibly there would be a violation of the Securities Act as well. But [fol. 90] here the initial contract that they are relying on is that of broker and principal, and it seems to me that is a fact question that permeates the whole case.

The Court: I judge from Mr. Streissguth's statement there that it is more or less of a recital to establish that fiduciary relationship in order to prove up the question of fraud as to the subsequent transactions, misrepresentations alleged, and also the claim that while acting as the agent, instead of acting as an agent they were as a matter of fact acting as a broker. I have no particular desire to take away the questions of fact from the jury, because that is an easy way out for myself.

Mr. Streissguth: I can say to counsel off the record here——

Mr. Palmer: Well, of course if it is along the line as in the Dr. Vogel case it doesn't seem to me that we have any very serious issue of fact to present to the court, but that of course is a matter of counsel's opinion.

The Court: The fight probably will be over the questions of law which have been enumerated by counsel.

Mr. Palmer: Yes, I have no doubt but what the questions of law will form a most significant and controlling part of the case, but the issues of fact here may also assume considerable importance. Counsel has talked about the so-called trading account and pool operations. I assume that will raise an issue of fact here.

The Court: Well, it would appear to me if a jury were [fol. 91] called in they would only be asked to answer one interrogatory. They couldn't determine the main issues.

Mr. Streissguth: They couldn't hardly return a general verdict.

The Court: Not very well; unless of course they answered the interrogatory no, but that would determine the issues anyway.

Mr. Palmer: Yes. As I see the way the case will probably be now, before the case is submitted to the jury, the court upon motions for a directed verdict would hear the questions of law argued at length upon the points, first, of the violation of the Securities Act, and whether that gave rise to an action of implied fraud; next the court would hear argument upon the question of the tolling of the statute of limitations, then the court would hear such arguments as there might be on the contentions of counsel that the proof was not sufficient to establish any allegations of fraud. Then after passing on the first two questions of law the court would determine whether there was any question to go to the jury on the issue of fraud or issues of fraud.

The Court: Some of those questions probably the court wouldn't care to answer forthwith, without giving it some consideration.

Mr. Palmer: Yes.

The Court: For that reason we wouldn't hold a jury in abeyance.

Mr. Palmer: I understand that you are making no claim as to express representations in the case.

[fol. 92] Mr. Streissguth: As to the registration of the stock.

Mr. Palmer: As to the registration of the stock.

Mr. Streissguth: That is right. That is what I have said before.

The Court: That you rely on only implied representations.

Mr. Palmer: Are you relying upon any express contract of agency or of brokerage relationship?

Mr. Streissguth: We will further concede that the so-called agency relationship, or fiduciary relationship, was never consummated, that all that we rely upon is a representation made as an inducement to purchase, made to the plaintiff by the defendant at the time of the purchase, a representation that they would act as agent. That agreement was never actually consummated. In the final transaction the defendant was in fact acting as owner and principal, and as interested in this stock which it sold to the plaintiff at that time.

The Court: And you are relying upon no acts of the defendant as agent?

Mr. Streissguth: We are relying upon its general duty as a broker of stocks to disclose certain facts, among them its interest in the stocks, among them its manipulation of the market and matters that we say were concealed from the plaintiff, which should have been disclosed. There was a failure to disclose and a concealment and suppression of facts in reference to the manipulation of the market, which we definitely rely upon and which we are not waiving regardless of what the first relationship between the parties was. [fol. 93] Mr. Palmer understands that.

Mr. Palmer: I am sorry I don't quite completely understand the significance of that concession. In the first place, I can't conceive of a representation of agency somehow standing apart from the establishment of an agency contract. If I say to Mr. Streissguth that I will act as his broker or agent to buy him a piece of land, and Mr. Streissguth says: "All right, go ahead and get it for me," it seems to me you have got a contract of agency there established. Now, to say that we are relying upon a representation of agency as distinguished from some contractual relationship is a confusion of terms, your Honor, and I would just like to know, first of all, if we can rely upon the claim that the contractual relationship here between the parties

was buyer and seller. It seems to me if we can rely upon that, we are not confronted with any serious issue of fact.

Mr. Streissguth: Well, we won't go to that extent.

Mr. Palmer: Would you clarify the extent to which you will go on that point of fact?

Mr. Streissguth: I will, if I haven't already. We claim that in the first instance, the defendant, through its agent, represented that it would buy for the account, or buy for the plaintiff, and that plaintiff understood that they were acting in the capacity of her brokers, advisers and agents; that in truth and in fact the defendant was not acting as the plaintiff's agent, but was acting as a principal [fol. 94] in the transaction and sold the plaintiff its own stock, stock in which it was adversely interested, and stock which it was manipulating the price of on the New York or on the over-the-counter market. We say in the final analysis there was a sale from the defendant to the plaintiff, but made under representations to the plaintiff, and under a belief by the plaintiff that through it all the defendant was acting as her broker. That is our claim, and we claim further, as Mr. Edelman has just suggested, that the matter of suppressing these facts, concealing this market manipulation, does not depend upon the establishment of any fiduciary relationship, or any representations as to fiduciary relationship. Under the Stewart case in the United States Supreme Court they definitely held that under certain circumstances the seller must disclose facts whether he holds a fiduciary relationship or not.

Mr. Palmer: If the court please, if the establishment of a fiduciary relationship is unnecessary in this case, and it seems that the fiduciary relationship is the issue of fact which is involved in this action, then it seems to me that counsel for plaintiff could well agree that that issue of so-called representation of agency go out of the case.

Mr. Streissguth: I would like to oblige Mr. Palmer, but I can't do that because it is in the case.

The Court: I don't understand that you claim the representations were made as agent of the plaintiff, that is, that they were not acting as her agent at that time.

[fol. 95] Mr. Streissguth: No, they had changed, shifted their position to a seller, and were selling at the time the transaction was consummated.

The Court: So practically the main issue here is the question of fraud as between buyer and seller.

Mr. Palmer: That is right. If that is to be understood, if the main issue here is one of fraud between buyer and seller, contractual relationship between them, that of buyer and seller, it doesn't seem to me we have any issue of fact of any consequence to go to the jury.

Mr. Streissguth: I don't want to preclude counsel from asking a determination by the jury of the question of fact. I have tried to make it as clear as I can what our claim is. I have gone to the extent of disclosing what we won't prove, and what our proof will be, but for counsel to ask me to eliminate entirely these representations, or offers to act as brokers, I can't do, your Honor, because they are in the case. I want to show all the circumstances, all the statements between the parties.

The Court: It is more or less preliminary, leading up to the main issue.

Mr. Streissguth: Yes, that is correct. But it is important, the duty to disclose, and upon reliance.

Mr. Palmer: Again, it doesn't seem to me that we have progressed very far with respect to this particular issue. However, I may be in error in my assumption. I would like to have a moment to think it over and to confer with my senior, Mr. Stinchfield, if I might. With the court's indulgence may I have a few moments adjournment?

[fol. 96] The Court: Yes.

(A short recess.)

Mr. Palmer: If the court please, I understand that Mr. Streissguth is prepared to make a statement for the purpose of the record, which you may now make.

Mr. Streissguth: Well, your Honor, in order to clarify the issue somewhat, we are ready to concede that we are relying mainly upon the relationship of seller and buyer between the parties. There will be some testimony in reference to representations and offers to act as broker and agent. Those can be considered as merely circumstances surrounding the entire situation. The violation of the duty which we rely upon ultimately is the duty of a seller to a buyer.

Mr. Palmer: With that concession, your Honor, the defendant agrees that a jury may be waived.

Mr. Streissguth: Are we ready to proceed, then?

Mr. Palmer: I suppose, your Honor, there ought to be a ruling on our motion to compel the plaintiff to elect between two inconsistent causes of action.

The Court: I think with the concession that has already been made that is out of the case.

Mr. Palmer: Yes, your Honor. I think possibly that may be true.

The Court: I think we are relying upon two questions now, fraud between purchaser and seller, and the question of the registration. I suppose it is conceded that it wasn't registered.

Mr. Palmer: Yes, your Honor, that is conceded.

Mr. Streissguth: And also the concealment and suppres- [fol. 97] sion, if that be distinguished from fraud. We are also relying upon concealment and suppression.

The Court: That would come under the general proposition of fraud.

CHARLES L. HAYES, sworn on behalf of plaintiff, testified:

By Mr. Streissguth.

Q. Your name is Charles L. Hayes?

A. Yes, sir.

Q. And you are the Deputy Commissioner of Securities of the state of Minnesota?

A. Yes, sir.

Q. How long have you held that position?

A. Since January, 1934.

Q. Your first commissioner under whom you acted was Mr. Skahen?

A. Mr. Benson, and then Mr. Skahen.

Q. Under Mr. Skahen, and now under Mr. Smith.

A. Mr. Smith, yes, sir.

Q. You are the first deputy, next to the commissioner in authority?

A. Yes, sir.

Q. At my request, and as deputy commissioner, have you made an examination of all the files and records in the office of the Commissioner of Securities of this state with reference to the stock of The Chase National Bank of New York and the Chase Securities Corporation, so-called?

[fol. 98] A. I have.

Q. Have you personally made that examination?

A. I did.

Q. On how many different occasions?

A. It is pretty hard to tell. The question arises occasionally.

Q. On numerous occasions?

A. On numerous occasions. The last one yesterday.

Q. Now, from an examination of those records can you tell us on or about what date the Chase Securities Corporation first made application for a license as a broker in securities in this state?

A. March 21, 1928.

Q. Did you bring with you the original and the certified copy of the correspondence, the application for license, and the order granting a license?

A. Yes, sir.

Q. Will you produce them?

A. That is the original, in 1928.

Q. Showing you what has now been marked as Plaintiff's Exhibit A, I will ask you whether that is a certified copy of the 1928 application for broker's license with the exhibits which accompanied that application, together with a letter dated March 20, 1928, from the law offices of Dent, Dobyns & Freeman submitting the application, and letter from the Department of Commerce acknowledging receipt of the application, and the resolution of the corporation appointing the Securities Commissioner as agent for service of process.

A. It is.

[fol. 99] Mr. Streissguth: May we stipulate that the certified copies may be used in lieu of the originals without any further foundation?

Mr. Palmer: Yes, Mr. Streissguth.

Mr. Streissguth: We then offer Plaintiff's Exhibit A.

Mr. Palmer: If the court please, we shall object to Exhibit A as immaterial. We have admitted in our answer that the defendant corporation was licensed as a broker of securities at or about the time shown in this Exhibit A. I see no reason for adding to what may be a voluminous record by putting in the application and all of the correspondence which preceded the issuing of this license. It seems to me that we are just going to clutter up the record and make for a record of such gigantic and unwieldly size that it will be difficult to deal with later on.

The Court: Anything except the license that is material?

Mr. Streissguth: Yes, your Honor. We have already indicated that we will claim an implied representation as to registration. This is important for the purpose of showing that that failure to register was not accidental, but was intentional; and to show the financial statement of the corporation from year to year, by a series of these exhibits, all as bearing upon the question of implied fraud, and as bearing upon the question of suppression of facts to the purchaser. This exhibit contains a financial statement, contains a list of the officers, and is also important on that issue. We will offer later the testimony of Mr. Hargraves as admissions on the part of the Chase Securities Corporation. At previous trials the defendant has objected to that on the ground that no authority on the part of Mr. Hargraves was shown. This is preliminary to that testimony. It has a number of purposes.

Mr. Palmer: If the court please, if Exhibit A is offered for any purpose other than proof of the fact that a license was issued, we object to it upon the further grounds that it is incompetent and hearsay. Our point is that this application was made to the Commissioner of Securities for a limited purpose, to-wit, the granting of a license as a broker. There is no showing and no foundation laid as to the authority of the person who purportedly signs this on behalf of the company. Now, if this is offered as an admission upon some issue there must be some independent proof of the fact that the person purportedly signing on behalf of the company was in fact the agent of the company and acting within the scope of his authority at the time.

Mr. Streissguth: It is admitted that the broker's license was issued and delivered to the corporation on the strength of this exhibit. That certainly is an admission on the part of the defendant as to the contents.

The Court: I will receive it at this time subject to the objection, without looking it over now.

Q. Do you have, then, the 1929 application for broker's license and the accompanying correspondence?

[fol. 101] A. Yes, sir.

Q. Before I go to that, Mr. Hayes, do you have the order granting the license in 1928?

Mr. Streissguth: Plaintiff's Exhibit B, Mr. Palmer, is a carbon copy of the broker's license, issued March 22, 1928. I

understand you consent it can be used in lieu of a certified copy without any further foundation?

Mr. Palmer: Yes, Mr. Streissguth.

Mr. Streissguth: We offer Plaintiff's Exhibit B, broker's license, dated March 22, 1928.

Mr. Palmer: We have no objection, your Honor.

The Court: Received.

Q. Then, the 1929 application you have handed me, have you not?

A. Yes, sir.

Q. State whether Plaintiff's Exhibit C is a certified copy of the 1929 application submitted by the Chase Securities Corporation with the correspondence that accompanied the same.

A. It is.

Mr. Streissguth: We offer Plaintiff's Exhibit C, the 1929 application.

Mr. Palmer: If the court please, we make the same objections as we made in the case of Exhibit A. May I re-state my position there? We object, first of all, on the ground that it is immaterial, and then we object to its use for any purpose other than that of proof that a license was issued on the ground that it is incompetent and hearsay because no connection between the person purportedly making it and the defendant company is shown.

[fol. 102] The Court: I will make the same ruling as to Exhibit A. I will take it subject to the objection.

Q. Mr. Hayes, is Plaintiff's Exhibit D a certified copy of the broker's license issued to the Chase Securities Corporation in 1929?

A. It is.

Q. Covering the period from March 22, 1929, to March 21, 1930?

A. That is right.

Mr. Streissguth: We offer Plaintiff's Exhibit D.

Mr. Palmer: That is the order of the Commissioner granting the application for broker's license?

Mr. Streissguth: That is right.

The Witness: 1929.

Mr. Palmer: For 1929. We have no objection.

The Court: It will be received.

Q. Now, do you have the 1930 application?

A. The original, yes.

Q. I will show you letter from Dent, Dobyns & Freeman, dated February 27, 1930; is that the letter submitting that application?

A. Yes, sir.

Q. And the formal application itself, is that what has been referred to?

A. That is right.

Q. Was there attached to that an annual report of The Chase National Bank of New York?

A. Yes, sir.

Mr. Streissguth: We offer that exhibit with the privilege of substituting a copy to be prepared by Mr. Hayes that will be Plaintiff's Exhibit E.

Mr. Palmer: I shall object to that, your Honor, on the [fol. 103] same grounds as advanced before to Exhibits A and C. I also add as an additional ground that it is immaterial in point of time, it being alleged in the complaint that the sale relied upon here took place on August 8th of 1929.

Mr. Streissguth: It includes the report for the year 1929, and is important on the issues that I have indicated as to manipulation and profits, and so forth during 1929.

Mr. Palmer: If it is offered for any purpose other than the fact that the license was issued to the defendant as a broker, we object to it on the ground that it is incompetent and hearsay.

The Court: This is the original application for 1930?

Mr. Streissguth: 1930.

The Court: It will be received subject to the objection.

Q. Will you make a copy of that?

A. Yes.

Q. Now, without supplying the application itself, will you state whether another application was presented in 1931?

A. Yes, sir.

Q. And a broker's license granted?

A. Yes, sir.

Q. Was that 1931 broker's license cancelled?

A. It was.

Q. Before it expired?

A. It was.

Mr. Streissguth: This is material, your Honor, upon the [fol. 104] question of withdrawal from the state. Plaintiff's Exhibit F is a certified copy of a letter dated June 17, 1931, from Rushmore, Bisbee & Stern, New York, addressed to the Commerce Commission of the state of Minnesota, notifying them of the intention to surrender the broker's license. We offer Plaintiff's Exhibit F in evidence.

Mr. Palmer: I object to this, your Honor, on the ground that no foundation has been laid, and by that I mean that there has been no showing that the firm of Rushmore, Bisbee & Stern is connected with the defendant corporation independent of the purported connection which may be shown by this letter. I therefore object——

Mr. Streissguth: We will withdraw the offer for the present, your Honor, in view of the objection. I will next have marked as Plaintiff's Exhibit G a letter from the Securities Corporation, dated July 2, 1931, signed by Henry Hargraves as secretary, addressed to the Commerce Commission of the state of Minnesota. I now offer Exhibit G.

Mr. Palmer: If the court please, I object to Exhibit G on the ground of lack of foundation for the same reason that I made before, namely, that there is no connection shown between Mr. Hargraves and the defendant independent of the purported showing by this letter. I therefore object to it on the ground that it is incompetent and hearsay.

Mr. Streissguth: The other exhibits that have heretofore been introduced show that Mr. Hargraves was the secretary. This letter was written on the stationery of the Chase Securities Corporation, and they accepted the cancellation of [fol. 105] their license.

The Court: I think I will receive it.

Mr. Streissguth: Plaintiff's Exhibit H is the order cancelling broker's license, dated July 7, 1931. It is now offered in evidence.

Mr. Palmer: No objection, your Honor.

The Court: Received.

Q. Plaintiff's Exhibit I is a letter from Wilson & McIlvaine, dated July 9, 1931, addressed to the Securities Division, Department of Commerce, surrendering and enclosing for cancellation agents' certificates issued to four men. I will ask you, Mr. Hayes, whether enclosed in this letter of July 9, 1931, this Exhibit I, there were the original

agents' certificates issued to those four men, Carman, Edson, Angland and Devine.

A. Yes, sir.

Mr. Streissguth: We offer Plaintiff's Exhibit I.

Mr. Palmer: I don't see that this is particularly material. We admit in our pleadings that the license of the defendant was cancelled. So I shall object to it on the ground that it is immaterial.

Mr. Streissguth: We want to show just what the Chase Securities Corporation did in reference to removing from the state, ceasing operations entirely. This is one of the things they did.

The Court: I supose that is part of the mechanics there.

Mr. Streissguth: Yes.

The Court: I think I will receive it.

Mr. Streissguth: Now, in the light of the other exhibits, I offer this Plaintiff's Exhibit F, which is the letter from [fol. 106] the law firm of Rushmore, Bisbee & Stern. Counsel has objected on the ground of no foundation, but I believe that it is admissible in connection with the other letters as showing the surrender of that license at the request of the defendant.

Mr. Palmer: If the court please, in addition to the grounds that I have advanced, I would like to add the ground that it is immaterial. We have conceded in our pleadings that the defendant corporation had its broker's license cancelled at its request.

The Court: With that admission I think this other would be more or less superfluous.

Mr. Streissguth: I think so, perhaps.

Q. Have you prepared, at my request, after examination of your records, a list of the agents who were licensed as agents of the Chase Securities Corporation during the time that they operated under their broker's license?

A. Yes, sir.

Q. Have you that list with you?

A. Yes, sir.

Q. Was this list, Exhibit J, made from the records of the Securities Commission of the state of Minnesota?

A. It was.

Mr. Palmer: If the court please, we have no objection to this list in so far as it shows agents' licenses issued prior

to the date of the transaction here in suit, which as I understand it, was August 8th or 10th, 1929. So that would carry us down to the date shown here, 7-11-29. As to the balance [fol. 107] of the list I shall object on the ground that it is immaterial in point of time.

Mr. Streissguth: It is merely material for the purpose of showing that they were doing business continuously over a period of time ending in July, 1931, and it is important on the issue of the statute of limitations.

The Court: Doesn't that already appear from the exhibits in?

Mr. Streissguth: This is a list of the men who acted as agents, and the extent of their activities.

The Court: The evidence already shows they were licensed.

Mr. Streissguth: As brokers.

The Court: As brokers.

Mr. Streissguth: And these are the names of the individual agents. It is not important, but it is one circumstance, again.

Mr. Palmer: May it be understood the offer is limited to those whose licenses were issued prior to the date of the present transaction?

Mr. Streissguth: No. I am offering those afterwards, too, on the issue of doing business within the state and to show the change in the set-up after July, 1931, to show an actual withdrawal from the state. I don't know why you can object very seriously.

Mr. Palmer: Well, I don't see any reason for including in the record here something that doesn't have to do with the transaction in suit. It seems to me that it is only reasonable to assume that after the defendant's license as a broker [fol. 108] was cancelled it complied with the law and didn't do any more active business of selling securities here.

Mr. Streissguth: We have no desire to encumber the record either, but we think it has some bearing upon that issue, presence within the state and absence from the state.

The Court: I will receive it subject to the objection.

Q. Now, Mr. Hayes, state whether or not these so-called agents' licenses issued to agents by the Securities Commission had a fixed and uniform date of termination.

A. For a year; a year from the date of issue.

Q. They didn't all terminate on the same date?

A. No.

Q. So that each man's license ran for a whole year from the date of its issuance?

A. That is right.

Mr. Streissguth: Now, it will be claimed in this case that the solicitation in the preliminary negotiations as between the plaintiff and the Chase Securities Corporation were by a man acting for the defendant by the name of Weir Jepson.

Q. I will ask you whether any agent's license was ever issued by the State Securities Commission, or by the Department of Commerce to Weir Jepson.

Mr. Palmer: I shall object to that, your Honor, on the ground of lack of foundation, not qualified to say.

(Question withdrawn.)

Q. Have you examined the records of the Securities Di-
[fol. 109] vision in reference to the issuance to Weir Jepson of any agent's license?

A. I have.

Q. Have you examined the records for the years 1928 and 1929?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. Have you made a thorough examination?

A. Yes.

Q. From that examination can you state whether or not any license was ever issued to Weir Jepson as an agent of the Chase Securities Corporation or of any other broker?

Mr. Palmer: I shall object to that on the same grounds. He can state what his records show.

Mr. Streissguth: That is what I am asking.

The Court: I suppose he would be limited to what the records show.

Q. I will state it in this form, do the records of the State Securities Commission, or the Securities Division of the state show the issuance of any license as agent to Weir Jepson during the years 1928 or 1929?

A. The records show that no license as agent for Chase Securities Corporation was ever issued to Weir Jepson in 1928 or 1929.

Q. Or at any other time?

A. Or at any time.

Mr. Palmer: If the court please, it doesn't seem to me that that is quite responsive to the question. I therefore move that it be stricken. It seems to me the witness could [fol. 110] testify that his records don't show anything, but it doesn't seem to me he can testify to that negative, and say that the records show that there was no license issued. I therefore move to strike it.

Mr. Streissguth: Isn't that rather critical, John?

The Witness: I followed the wording of the statute on that.

Mr. Palmer: I don't mean to be over technical, but Mr. Hayes has testified here that he took office in 1934. He has not had the custody of the records of 1928 and 1929. All he can testify to is that his records now show an absence of any records with respect to Weir Jepson covering the period of time that he was an official of the state.

Mr. Streissguth: We made a demand upon you to produce any agent's license to Weir Jepson. We renew that demand at this time and ask you to produce, if you claim any such license was issued.

Mr. Palmer: Mr. Streissguth: my point does not go to that claim. It simply goes to the point we move to strike the answer as not responsive.

The Court: Isn't that the purport of the answer, that as far as his records show there is no license?

Mr. Palmer: I don't think that it did. That is why I moved to strike. But with that understanding I am satisfied.

The Court: That is the way I understood the answer. That is all he can testify.

Q. Do the records of the Department of Commerce, Securities Division, show the issuance of any license as agent to Weir Jepson either in 1928, 1929, or any other [fol. 111] year?

A. They do not.

Mr. Streissguth: Now, Mr. Palmer, I will ask you to produce any agent's license to Weir Jepson that you may have.

Mr. Palmer: If the court please, I am endeavoring to get that information for Mr. Streissguth. I expect I will have it before the end of the trial of this case. I don't want to

mislead him or the court. I don't think that our records will show that Mr. Jepson was ever licensed in this state, but I am trying to find out where he is, and whether he held a license in any other state.

Mr. Streissguth: The state of Iowa.

Mr. Palmer: I have sent out and I have made search for him. With that I ask leave to withhold the compliance with his demand until I get further time.

The Court: You haven't such at the present time?

Mr. Palmer: I haven't such at the present time.

Mr. Streissguth: Do you claim there may have been a license for Minnesota, or don't you know?

Mr. Palmer: I am not prepared to say at this time. In so far as I know, there is absolutely no record on him in Minnesota. Mr. Hayes has been kind enough to tell me that, too.

Mr. Streissguth: You will produce any other license that he may have had from Iowa or any other state?

Mr. Palmer: I will do my best to comply with Mr. Streissguth's notice to produce.

[fol. 112] Q. Now, will you produce a letter from the Chase Securities Corporation, dated June 29, 1929, to the Securities Commissioner at St. Paul, which I will have marked? Showing you Plaintiff's Exhibit K, I will ask you whether that is a certified copy of such a letter.

A. Yes, sir.

Mr. Streissguth: We offer Plaintiff's Exhibit K in evidence.

Mr. Palmer: I object to this, your Honor, on the ground that it is immaterial both as a matter of law and under the issues in this case. I object to it further on the ground that no foundation has been laid. I mean by that that there has been no proof of the connection of Mr. Frank J. Fitzgerald, the purported signer, as any kind of an agent, or assuming agency or any kind of authority to act for or on behalf of the Chase Securities Corporation. I add, therefore, the further grounds that this offer of Plaintiff's Exhibit K is incompetent and hearsay.

Mr. Streissguth: It is material on the issue of implied fraud and good faith of the defendant, or lack of good faith, on the question of registration or non-registartion of its securities.

The Court: The objection of course went to the question of authority there.

Mr. Streissguth: There is a presumption, I presume, from the fact that it was written as it was.

The Court: Received subject to the objection.

Q. Did the Securities Commission, in compliance with that letter from Mr. Fitzgerald, of the Chase Securities [fol. 113] Corporation, mail a copy of the Blue Sky Laws of Minnesota to him?

A. The only thing I know is an endorsement on the letter of the word "Sent," and the date, "July 2, 1929." The initial "F" is Miss Fink's, that used to be chief clerk in the office. Other than that I have no information.

Q. That notation is on the——

A. It is endorsed on the original letter.

Q. You say it is an "F"?

A. Yes. I know her writing, Miss Fink.

Q. On the certified copy it is an "S."

A. It should be an "F."

Q. Will you change that on Exhibit K?

(Witness does as requested.).

Q. That endorsement, you say, is by the chief clerk at that time of the Commission?

A. Yes, sir.

Mr. Palmer: Now, if the court please, I would like to ask a question for the purpose of laying a foundation for an objection.

By Mr. Palmer:

Q. You say Miss Fink was the chief clerk at that time that letter "F" was endorsed on there?

A. Yes, sir.

Q. You were not in the employ of the Commission at that time, were you?

A. No, I was not.

Q. Do you know Miss Fink's handwriting?

A. Yes. I have a sample of it here.

Q. Do you know it only by reference to the sample of what you see on this document which you hand to me, a [fol. 114] purported proof of service?

A. No, I have seen her signature hundreds of times. I recognize it.

Q. Are you able to tell from the letter "F" which has been endorsed upon this?

A. And the "Sent."

Q. Now, you are basing your statement, then, upon the word "Sent," and the letter "F," that that is her handwriting?

A. That is my opinion, yes.

Mr. Palmer: I shall object to the introduction in evidence of Plaintiff's Exhibit K on the ground of lack of foundation.

The Court: I will let it stand. He said he didn't know whether it was sent or not. He simply identified one word there and the initial.

By Mr. Streissguth:

Q. Now, Mr. Hayes, you are familiar by this time, I take it, with what is known as the Bankers Trust Company receipt evidencing ownership of stock in The Chase National Bank of the City of New York and the Chase Securities Corporation?

A. Yes, sir.

Q. And you are familiar with the form of that receipt as it was during the years 1928 and 1929, as it was used during those years?

A. Not to a great extent.

Q. Well, you have seen it?

A. Yes.

Q. In 1930 the form of the certificate was changed to what we commonly refer to as a duplex certificate, with a certificate of stock of the bank on the front and a certificate [fol. 115] of stock in the Chase Securities Corporation on the back, but in 1928 and 1929 the ownership of the two stocks was evidenced by what is known as a Bankers Trust Company receipt. Have you examined the records of the Securities Division of the Department of Commerce in connection with the registration for sale in the state of Minnesota of the stock of the Chase Securities Corporation and of The Chase National Bank of the City of New York?

Mr. Palmer: I don't want to interrupt you, but do you want the stock certificates in this case?

Mr. Streissguth: Yes, John.

(Mr. Palmer produces certificates.)

Mr. Streissguth: Counsel for defendant has produced what has been marked as Plaintiff's Exhibit L, a Bankers Trust Company receipt to Ruth Chase Donaldson, dated September 9, 1929, for eight shares of stock in The Chase National Bank of the City of New York and in the Chase Securities Corporation. Now, Mr. Palmer, may it be stipulated that that is the certificate of stock which was delivered to Ruth Chase Donaldson, the plaintiff in this case, by the defendant as part of the transaction that is in issue here?

Mr. Palmer: I am so informed, Mr. Streissguth.

Mr. Streissguth: By that you mean you admit it?

Mr. Palmer: Certainly.

Mr. Streissfuth: We offer Plaintiff's Exhibit L, the eight-share trust receipt, in evidence, and are willing that [fol. 116] counsel substitute a photostatic copy therefor.

Mr. Palmer: We have no objection, of course, your Honor, but we would like to have it understood that a photostatic copy be substituted for this exhibit and that this exhibit be preserved with some care. It is the only one we have in the files of the company.

The Court: That may be done. Have you a photostat with you?

Mr. Palmer: Yes, we do, your Honor.

The Court: You might have it marked and substitute it. I will receive it.

Mr. Streissguth: Your Honor, the record will show that in July, 1929—I think counsel won't argue about that—a twelve and one-half per cent dividend was declared so that on the eight shares Mrs. Donaldson would have procured one additional share.

Mr. Palmer: I would like to correct counsel's statement as to the date. I understand that the stock dividend was issued August 23, 1929.

Mr. Streissguth: Well, that correction may be granted. I will offer Plaintiff's Exhibit M, a Bankers Trust Company receipt for one share, dated February 3, 1930, which I believe the evidence will disclose to be the twelve and one-half per cent dividend. The evidence will develop that.

Mr. Palmer: We have no objection to the offer of Plaintiff's Exhibit M, but, of course, we assume that counsel will

produce such evidence as he has later in the day to show when it was issued, how it was issued, and under what cir-
[fol. 117] cumstances.

The Court: I will receive it.

Mr. Streissguth: That is correct. Now, it is admitted in the answer that in the year 1930 the form of the stock certificate was changed from a Bankers Trust Company receipt to what we commonly refer to as a duplex receipt issued direct by the two corporations, without the intervention of the Bankers Trust Company. I offer now Exhibit N, a certificate to Ruth Chase Donaldson, in duplex form, dated November 6, 1930, for nine shares, being the eight plus one, and I believe it will be stipulated by counsel that that is the original Ruth Chase Donaldson stock converted into the duplex form.

Mr. Palmer: Yes, your Honor, I will concede it, but I would like to say that this so-called duplex certificate was exchanged by the plaintiff, Mrs. Donaldson, for the Bankers Trust Company receipt which has been identified as an eight-share certificate, and the Bankers Trust Company receipt identified as the one-share certificate.

Mr. Streissguth: It may be so stipulated.

Mr. Palmer: I also would like to have it understood that the statement of counsel here with respect to the corporate nature of these changes, with respect to the mechanics of handling this are not binding upon us as to those issues of fact which will be developed later on in the case in particularity and in detail, and which will more accurately state than counsel can now state what those corporate changes were which resulted in the different types of certificates. May it be so understood?

[fol. 118] Mr. Streissguth: I didn't understand there were any corporate changes in 1930. It is the same name and the same corporation, but you eliminated the Bankers Trust Company.

Mr. Palmer: What I mean is this, that by our last statements now in stipulation I do not want to be bound at some point later in the case to an admission which may not be strictly accurate in respect to the Bankers Trust Company in the way this stock was issued, or in the exact form that it took under the deposit agreement and under the articles of incorporation.

Mr. Streissguth: All I am asking you to do is to produce the original Bankers Trust Company receipts, the dividend

receipt, and the duplex certificate issued to Ruth Chase Donaldson, and you have so produced them, haven't you?

Mr. Palmer: I have.

Mr. Streissguth: And you admit those are the certificates involved in this lawsuit?

Mr. Palmer: I admit that, sir.

Mr. Streissguth: And you admit that the duplex certificate for nine shares is a converted form of the two Bankers Trust Company receipts?

Mr. Palmer: That is right. I think we understand each other.

Mr. Streissguth: Will you also admit that in 1936 at the request of the defendant Mrs. Donaldson surrendered her duplex certificate for nine shares and received in lieu thereof a certificate for nine shares in The Chase National Bank, and a separate certificate for one share in the Amerex [fol. 119] Holding Corporation?

Mr. Palmer: If the court please, I cannot admit that she did exchange her duplex certificate for the separate certificate in the bank and the Amerex Holding Company at the request of the defendant. I will admit that she duly exchanged her so-called duplex certificate for separate certificates in the bank and the Amerex Holding Corporation, and that she exchanged at or about the time shown upon the separate certificates in the bank and the Amerex Holding Corporation.

Mr. Streissguth: Plaintiff's Exhibits P and O. And you will further admit, will you not, that the Amerex Holding Corporation is the same corporation as the Chase Securities Corporation after it underwent two changes in corporate names?

Mr. Palmer: If the court please, our situation with respect to the Amerex Holding Corporation is set out in greater detail and more accurately in our pleadings than I could so state it now here in court in the form of an admission. I think that my pleadings show that the Amerex Holding Corporation is now the name of what was the Chase Securities Corporation, but there have been changes in corporate set-up; there have been changes in corporate structure which I do not like to say at this time rendered the Chase Securities Corporation and Amerex exactly the same corporations.

Mr. Streissguth: All right, so we know there is some connection between the two.

Mr. Palmer: I would prefer not to be bound by any admission with respect to the corporate set-up of these cor-
[fol. 120] porations at this time because the matter is complicated and the facts and the circumstances will show as they are developed in evidence in this case the accurate situation.

Mr. Streissguth: Now, we offer Plaintiff's Exhibit N, the duplex nine-share certificate, the 1930 certificate duplex form.

Mr. Palmer: No objection.

The Court: Received.

Mr. Streissguth: With leave to substitute photostats. We offer also Plaintiff's Exhibit P, being the 1936 certificate of stock in The Chase National Bank alone, and Plaintiff's Exhibit O, certificate, dated August 12, 1936, for one share in the Amerex Holding Corporation.

Mr. Palmer: No objection.

The Court: Received.

Q. Now, Mr. Hayes, showing you Plaintiff's Exhibit L, Bankers Trust Company receipt, I will ask you whether the records of the State Securities Commission, or the Division of Commerce, show that this security was registered for sale in Minnesota at any time during the years 1928 or 1929, or any subsequent year.

A. It was not registered.

Q. Do the records so show?

A. Yes.

Q. Now, state whether or not the records of the Securities Division of the Department of Commerce show whether the stock of the Chase Securities Corporation was ever registered for sale in the state of Minnesota during the years
[fol. 121] 1928, 1929, or any subsequent year.

A. The records show that the stock was not registered.

Q. What do the records show in reference to the registration of the stock of The Chase National Bank of the City of New York?

A. The records show that Chase National Bank stock was never registered.

Q. State whether or not any application was ever made to register either the Bankers Trust Company receipts

or the stock of the Chase Securities Corporation, or the stock of The Chase National Bank of the City of New York?

Mr. Palmer: Of course, your Honor, there is no foundation laid for that question.

Q. I am asking you to base your answers upon the examination that you testified you made of the records. That is understood. Is there any application on file for the registration of any of these securities at any time?

A. The records show that no application has ever been made to register any of the named securities.

Q. Or were there any notification, or any registration by notification ever made of any one of the securities?

A. No registration was ever attempted by notification.

Q. Do the records so show?

A. The records so show.

Mr. Streissguth: Now, Mr. Palmer, will you admit that the stock of The Chase National Bank of the City of New [fol. 122] York, neither the stock of the bank nor the stock of the Chase Securities Corporation or the so-called Bankers Trust Company receipts were listed for trading on the New York Stock Exchange, on any other stock exchange by official authorization of such exchange at the time of the transactions with the plaintiff, Mrs. Ronaldson?

Mr. Palmer: I prefer not to at this time, Mr. Streissguth.

Q. Was the stock of the Chase Securities Corporation, which you say was never registered for sale in this state, ever registered for sale in conjunction with any other stock, so far as the records show?

A. I don't quite understand your question.

Q. Well, sometimes stocks are sold in conjunction with other stocks, premiums, matters of that kind; was this stock of the Chase Securities Corporation ever registered for sale in any form?

A. I find no record of that.

Q. Either singly or in conjunction with other stocks?

A. I find no such record.

Mr. Streissguth: Now, Mr. Palmer, I will ask you to produce any license to sell or any registration of any of these securities that may have been issued to the Chase Securities Corporation. I will ask at this time to produce.

Mr. Palmer: I will ask you to state that again.

Mr. Streissguth: I will ask you to produce any license or registration of any securities of the Chase Securities Corporation. You don't claim the stock was registered for sale, [fol. 123] do you, in Minnesota?

Mr. Palmer: No, I don't. I don't have any such records. My position is that the stock was exempt, stock of a national bank.

Mr. Streissguth: You don't claim that there was ever any registration?

Mr. Palmer: No.

Mr. Streissguth: You will also admit that after January 11, 1928, neither the stock of the bank or the stock of the Securities Corporation, or the stock of the Bankers Trust Company receipts were listed for trading on the New York Stock Exchange or any other stock exchange?

Mr. Palmer: Mr. Streissguth, I would prefer, as I said before, to reserve any statement on that point. I prefer not to make a concession.

Mr. Streissguth: We ask you to produce at this time any official authority, or official listing of that stock upon the New York Stock Exchange, the Chicago Stock Exchange, or the Boston Stock Exchange.

Mr. Palmer: What number is that notice to produce?

Mr. Streissguth: We will let that go until after dinner. I think that is all we have.

[fol. 124] Cross-examination.

By Mr. Palmer:

Q. Mr. Hayes, you took office in 1934, did you not?

A. I was appointed deputy in 1934. I went there originally March, 1933. January 5th, I think, of 1934, I was appointed deputy.

Q. You were not connected with the office prior to January 5, 1933?

A. In March, 1933.

Q. In March, 1933?

A. That is right.

Q. You became a deputy in——

A. January, 1934.

Q. —January, 1934. Have you produced this morning all of the files and records of the Chase Securities Corporation?

A. There are some records that are in large book entries. I have all of the original documentary records here.

Q. Do you have with you in your files this morning a letter relating to the Chase Securities Corporation dated July 19, 1935, addressed to Messrs. Streissguth & Fordyce, of New Ulm, and purportedly signed by yourself, more accurately described as a carbon copy of a letter addressed to Messrs. Streissguth & Fordyce?

A. July 19, 1935?

Q. Yes.

A. Yes. (Producing letter.)

Q. Calling your attention to Defendant's Exhibit 1, I will ask you if you recall whether or not your signature appears [fol. 125] upon an original letter of which this is a duplicate.

A. I wouldn't know. Sometimes I will leave the office and the stenographers will sign letters without me seeing the original. I wouldn't know.

Q. You wouldn't know whether this is a true and correct copy of the original or not?

A. I would say that it is, yes.

Q. This is part of your files and records, is it not, this Defendant's Exhibit 1?

A. Yes, it is.

Q. And it was produced from your files and records, wasn't it, just now?

A. Yes.

Mr. Palmer: We offer in evidence Defendant's Exhibit 1.

Mr. Streissguth: What is the purpose of it?

Mr. Palmer: The purpose of this is to show, your Honor, that at or about the date that this letter bears the Deputy Commissioner of Securities, in response to an inquiry said that the stock of The Chase National Bank was exempt from registration under the Securities Act of the state of Minnesota; and we believe that this has a bearing on this issue of so-called implied fraud. It shows an attitude and opinion by one in his official capacity whose duty it was to administer the law, and reflects in some measure upon this issue of the so-called implied fraud.

Mr. Streissguth: This letter was written to me, your Honor, in 1935, six years after this transaction took place. There is no showing that the Chase Securities Corporation, [fol. 126] the defendant, ever acted upon similar advice, or that any similar advice was given by the Commissioner six years before. It is purely a voluntary opinion on the

part of the witness here as Deputy Commissioner to the effect that in his opinion the stock didn't have to be registered. I don't see how that can have any bearing upon it. I am perfectly willing the court should read it and consider it, but I don't believe it is the least bit material. It was after this litigation had commenced.

Mr. Palmer: It is an expression of an official opinion about a question of law. An official in his capacity and connection would be presumed to know something about it.

Mr. Streissguth: We of course claim that that is an erroneous opinion. We wouldn't be here in court if it was right.

The Court: I will receive it.

The Witness: May I substitute a certified copy for that, Mr. Palmer?

Mr. Palmer: Certainly. As a matter of fact, Mr. Hayes, I have a typewritten copy of that letter.

Mr. Streissguth: I might also call attention of the court, as suggested by Mr. Edelman, all that Mr. Hayes says here is that the stock of the bank is exempt, nothing being said about whether the stock of the Securities Corporation was exempt. Of course that is the illegality that taints the entire transaction.

Mr. Palmer: If the court please, inquiry has already been [fol. 127] made about the stock of the bank and registration.

(Recess until 2 P. M.)

May 9, 1939, 2 o'clock P. M.

Charles L. Hayes resumed the stand, and testified further as follows:

Cross-examination (Continued).

By Mr. Palmer:

Q. Now, Mr. Hayes, you have testified that the stock of the Chase Securities Corporation and The Chase National Bank was not registered. By that you meant that there was nothing in your files which showed any application, notification or other means of registering stock, did you not?

A. Or action by the department.

Q. Or any action by your department?
A. That is right.
Q. In other words, you have found a complete absence of any papers dealing with that in your file?
A. That is correct.
Q. The same is true with respect to the broker's or agent's licenses issued to one Weir Jepson?
A. That is correct.

Mr. Palmer: That is all.

(Witness excused.)

[fol. 128] Miss Helen Chapman, sworn in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Streissguth:

Q. Miss Chapman, during the years 1928 to 1929 were you employed in the Minneapolis office of the Chase Securities Corporation?
A. Yes, I was.

The Court: What years are those?
Mr. Streissguth: '28 and '29.

Q. When did you begin your employment for that company?
A. September 1, 1928.
Q. Prior to that time had you been employed in the office of the National City Company in Minneapoli ?
A. In St. Paul for the National City Company.
Q. And for how many years?
A. March 1, 1926, to September 1, 1928.
Q. And how long did you continue in the employ of the Chase Securities Corporation under that name?
A. Under the Chase Securities Corporation until June 1, 1930.
Q. And after that was the name changed?
A. Under the Chase, Harris, Forbes Corporation.
Q. I think it was 1931 that that name was changed?
A. Yes.
Q. 1931?
[fol. 129] A. Yes, 1931.

Q. And you continued until the name was changed to Chase, Harris, Forbes Corporation?

A. That is right.

Q. After that how long did you continue with Chase, Harris, Forbes?

A. October 15, 1931.

Q. At that time did you sever your connections?

A. Yes, that is right.

Q. Where did the Chase Securities Corporation maintain its offices in Minneapolis to start with?

A. In the McKnight Building.

Q. And what offices did they have there?

A. They had three—oh, three small offices together.

Q. Three small offices?

A. Yes.

Q. And was that office address changed during the time that you were employed by them?

A. Well, for two weeks prior to going into 528 McKnight Building we were in a temporary office and then after leaving the McKnight Building June 1, 1930, we went to the Northwestern Bank Building ground floor.

Q. Ground floor?

A. Ye (nodding head).

Q. Now, referring particularly to that time from 1928 to 1929 when the offices were in the McKnight Building, will you tell what employees there were in the Minneapolis office?

A. There were two salesmen, Mr. Maurice P. Angland [fol. 130] and Robert W. Barnes, and Mr. Devine, the sales manager, and myself.

Q. And were there any other offices maintained in Minnesota at the time?

A. Yes, there was an office in the Merchants Bank Building in St. Paul, and in the Selwood Building in Duluth.

Q. State whether or not the Minneapolis office was the state headquarters.

A. Yes, the Minneapolis office was in charge of the two other branch offices.

Q. They were branch offices of the Minneapolis office?

A. Yes.

Q. What was the so-called control office to which the Minneapolis office reported its transactions?

A. The Chicago office was known as the control office.

Q. What were your duties there in that office at that time?

A. Why, in the early part—

Q. Yes.

A. —in that 1928 to 1929? Well, I took dictation and I ran the Teletype machine and I answered the telephone and I took the orders and I shipped the orders and I shipped the securities, and, well, about everything.

Q. You did the secretarial, stenographic and bookkeeping work?

A. Yes, and the filing and the record keeping.

Q. You mentioned a Teletype machine. With what office was that connected?

[fol. 131] A. With the McKnight Building and the Northwestern when we were there, both of them.

Q. I mean at the other end of the wire.

A. Oh, Chicago.

Q. Did you have a direct wire to Chicago?

A. Through Milwaukee office, yes.

Q. Through the Milwaukee office, and had a Teletype?

A. Had a Teletype.

Q. And where were the quotations received on the stock that was being sold, from what office, the daily quotations?

A. We received them from the Chicago office.

Q. Now, besides the men that you have mentioned, Mr. Devine and Mr. Angland and Mr. Barnes, did the office also employ so-called guards in connection with delivery of securities?

A. Yes, we did.

Mr. Palmer: This was in 1928 and 1929 the inquiry is of.

The Witness: Well, we didn't have guards at that time.

Q. When were the guards first employed?

A. In June 1, 1930.

Q. Up to that time there were no guards?

A. Yes, sir, no guards.

Q. Now, did the staff of salesmen always remain at two or did it change?

A. No, it was increased.

Q. And who were other salesmen that were employed working out of the Minneapolis office in 1929?

[fol. 132] A. Frank W. Phillips.

Q. Yes.

A. That was all up to through 1929.

Q. Was there a man employed at the office by the name of Weir Jepson?

A. No, he was not.

Q. Did you know him?

A. Yes, I did.

Q. Was he an employee of the Chase Securities Corporation?

A. Yes, he was.

Q. And out of what office?

A. Sioux City, I think.

Q. Sioux City, Iowa?

A. Yes.

Q. Did he from time to time call up the Minneapolis office?

A. Yes, he did.

Q. And did he from time to time deliver orders for deliver of stock for Minnesota clients?

A. Well, I can remember two occasions in which—the others came through the Chicago office for him to a Minnesota client.

Q. Now, in a general way will you tell the court what securities were being handled through the Minneapolis office?

A. Stocks and bonds, and that was all.

Q. Stocks and bonds?

A. Stocks and bonds.

Q. And among the stocks and bonds that were being handled through the Minneapolis office, state whether or not the stock of The Chase National Bank and Chase Securities [fol. 133] Corporation in the form of Bankers Trust receipts were being so handled.

A. Were being——

Q. Were being handled out of this office.

A. Yes, they were.

Q. And can you tell us about how many sales of the stock that I have just mentioned, which we will call Chase units, Chase National Bank stock with the Chase Securities stock combined, how many of those, that character of securities, were sold in Minnesota; sold and delivered in 1928 and the first six months of 1929?

Mr. Palmer: If the court please, I shall object to that as no foundation having been laid for it.

Mr. Streissguth: It probably involves a conclusion. I will withdraw it in that form.

Q. I am going to ask you first to state the mechanics in connection with the sale of this stock which I will refer to hereafter as Chase units—you know what I mean by that, that is the combination of The Chase National Bank stock and the Chase Securities stock. What were the mechanics with reference to the sales of that stock to customers in Minnesota?

A. Well, the salesman would get his order and it would have to be a signed order. We had order blanks which the salesman carried in his pocket. It was a signed order and that was the original and he would give the original to the customer and he would bring back the other two copies, one for our file and one which I shipped to Chicago. I would [fol. 134] take the order, and if it was in the early part of the day, I would either——

Q. If you will speak so that——

A. I would wire the order to Chicago—, but if it was after 3 o'clock they would go through the mails, not having been wired in previously.

Q. That is, the first step is the order?

A. Yes, that is the first step.

Q. What would be the next step?

A. Of course on the order were the registration instructions, if any, and the method of payment and where the stock was to be shipped.

Mr. Streissguth: Mr. Palmer, do your have one of those sales blanks?

(Plaintiff's Exhibit Q is marked for identification.)

Q. Now, I will show you what has been marked Exhibit Q, without reference to any of the writing on it I will ask you whether that is the form of a sales order such as you have tried to describe.

A. Yes.

Q. And whether, by any chance, the writing on that is your handwriting?

A. Yes, it is.

Q. Now, by an examination of that exhibit can you tell me whether that is the sales order that was made out at the Minneapolis office in connection with the sale of eight

shares of stock to Ruth Chase Donaldson, the plaintiff in this case?

A. Yes, that was the order as phoned in.

Q. And it was phoned in to the office?

A. Into the Chicago office.

[fol. 135] Q. And who delivered the order to the Minneapolis office?

A. Well, I haven't a definite recollection whether that came from Chicago with instructions to make the order out or not.

Q. Your recollection is not clear on that?

A. No.

Mr. Streissguth: Well, now, we will offer Exhibit Q at this time.

Mr. Palmer: We have no objection, but we would like to have leave to substitute a photostatic copy for it. Will that be all right, Mr. Streissguth?

Mr. Streissguth: I have no objection.

The Court: That is satisfactory. Received.

Q. Then we look at this order. You say the writing on this order is yours, the handwriting?

A. Yes.

Q. And in the upper left-hand corner, following the printed words, "Order number," you have "Phoned"?

A. That is right.

Q. The word "Phoned" being in your writing?

A. Yes.

Q. What does that mean?

A. That indicated to the Chicago office that I had previously phoned that order in and this was merely to get confirmation of the order I had phoned. If I did not phone the order in or wire it in, then I would have entered in this place "Not entered," and that would indicate that that was a new order to them, they hadn't bought the stock. But this is merely confirming what I had said over the tele-[fol. 136] phone to them.

Q. And now next in your handwriting we find the word "Confirmation." What does that signify?

A. That means that that is confirming this order that I phoned in.

Q. The order that you had confirmed?

A. Not that I am confirming it in the ordinary sense of the word.

Q. And your date, August 10, 1929, what date is that? The date that the order was received or the date that the slip was made out or what date?

A. Well, that was the date the order was received.

Q. The date the order was received. And then you have the purchaser's name, Mrs. Ruth Chase Donaldson, 4615 Emerson Avenue, Minneapolis, Minnesota. That is in your handwriting?

A. Yes.

Q. Now, under the word "Salesman and office," you have the words "Devine" and "Minneapolis." Devine was your manager, you say?

A. He was.

Q. Do you know whether he actually made the sale to Mrs. Donaldson or whether Mr. Jepson or some other salesman made it?

A. No, I don't think Mr. Devine made the sale.

Q. Why was it reported as one of his sales?

A. Well, we couldn't enter any salesman that wasn't under our jurisdiction on a sales slip going out of this office—our office.

Q. And in case of a sale by a non-resident agent, such as perhaps Mr. Jepson, did you enter such non-resident sales-[fol. 137] man's name or did you enter Devine's name?

A. We would enter Devine's name.

Mr. Palmer: Now, if the court please, I shall object to that on the ground of lack of foundation. Miss Chapman hasn't testified that she knew who made this sale. The question is based upon the previous question which is in hypothetical form. She hasn't testified to that.

The Court: You perhaps better ascertain.

Mr. Streissguth: We will have, not by Miss Chapman's testimony, but by Mrs. Donaldson's testimony, that she had no conversation with Devine and yet Devine's name appears. Now, I want to know what the explanation is from this witness.

The Court: It doesn't appear that she has had any personal observation.

Mr. Streissguth: Withdraw the previous question. I will put it this way:

Q. Were there cases in which, either in this case or in other cases, where orders had been received by non-resident agents?

Mr. Palmer: I shall object to that——

Mr. Streissguth: Of your own knowledge.

Mr. Palmer:—as incompetent and immaterial, your Honor; no foundation laid.

The Court: I think I will let her answer the question.

Q. You may answer the question.

A. No. We never had any other—an order from any other salesman except Mr. Jepson out of the state.

[fol. 138] Q. Take the case of Mr. Jepson then, were there cases in which he received orders from Minneapolis or Minnesota clients?

A. There were one or two cases.

Q. And in making reports on those transactions what salesman did you report as having made the sale?

A. Mr. Devine.

Q. Mr. Devine, the manager?

A. That is right.

Q. Now, in your handwriting again, as indicated, "8 shares Chase National Bank stock," and under the column "Price" there is the abbreviation "Mkt.," I assume standing for market?

A. Right.

Q. What does that indicate?

A. It was to be purchased at the market price.

Q. At the market price?

A. Of that day.

Q. And where was that market price established?

A. In Nev York.

Q. On what market?

A. Well, there was a bank stock exchange or market.

Q. Over-the-counter market?

A. Yes, over-the-counter.

Q. Was this stock listed at that time on the New York Stock Exchange?

A. No, it was not.

Q. Or on the Chicago or Boston Stock Exchange?

[fol. 139] A. No, it was not.

Mr. Palmer: If the court please, again may I move to strike the answer for the purpose of interposing an objection?

The Court: It may be stricken for that purpose.

Mr. Palmer: I shall object to the question, no foundation has been laid for it, no showing she knew where stock was listed or not.

The Court: I don't think it appears she has any knowledge of that yet.

Q. All right. Did you keep in touch with the New York Stock Exchange quotations from day to day during this period?

A. From top to bottom, I did, yes.

Q. From top to bottom?

A. Yes.

Q. Were you familiar, as part of your duties, with the various stocks which were listed and quoted on the New York Stock Exchange and Chicago Stock Exchange and the Boston Stock Exchange?

A. Yes, I was.

Q. And state whether at this time or at any time in 1929 the stock of Chase National Bank or the stock of the Chase Securities Corporation or the so-called Bankers Trust Company receipts were listed for trading on any one of these three exchanges.

Mr. Palmer: I shall renew my objection. She can tell what she saw in the newspaper, perhaps, but she can't say whether or not they were listed on the exchange.

[fol. 140] Mr. Streissguth: That is getting rather technical.

The Court: Let her give what information she has on it.

Q. You may answer.

A. No, they were not. The stock was not listed on any one of the three exchanges.

Q. And besides these three exchanges and their listings, were there also quotations in the daily papers on what is known as the over-the-counter bank stocks?

A. Yes, there were.

Q. And state whether or not these Bankers Trust Company receipts evidencing these two stocks were quoted in that form.

A. Yes, it was quoted.

Q. And now under "Remarks," and I assume that also is in your handwriting?

A. Yes.

Q. You write "Ship in street form to First National Bank, Minneapolis, for payment." Those were the instructions that you gave to the Chicago office?

A. Yes.

Q. And when you speak of street form, referring to stock certificates, state for the purpose of the record what you mean.

A. Well in street form it could be in any name, usually it was a brokerage house name.

Q. And then on the back state whether or not the stock would be endorsed in blank by the person in whose name it was issued.

[fol. 141] A. Yes, it would.

Q. Now, following the making out of the sales order and the sending of one of the office copies to Chicago, what was the next step in the mechanics of one of these transactions?

A. Then the Chicago office, when they get the order, wire it to New York and when they have purchased the stock they wire back to Chicago for the confirmation price and then Chicago would wire the Minneapolis office confirming the stock at such and such a price and then in a day or so would follow through the mails the confirmation sheet, a slip similar in size to this, confirming the stock and that——

Q. Confirming the sale?

A. The sale, and that was an orange colored flimsy——

Q. Now, you said something about the same size, did you also mean——

A. Well, that—this is the——

Q. Is this what you refer to (handing paper to witness)?

A. No, I was thinking of the shipment order. This one went to the customer.

Q. Let's get the shipment order. Was the shipment order next?

A. No, that was—the confirmation was next.

(Plaintiff's Exhibits R-1 and R-2 are marked for identification.)

Q. You have mentioned the confirmation slips as being the next records that were made out. Is that correct?

[fol. 142] A. Yes, that is correct.

Q. Now, I will show you Exhibits R-1 and R-2, the R-1 being white and the R-2 being yellow. I will ask you whether those are such confirmation slips as were used in these transactions at that time?

A. Yes, they were.

Q. And how many of those were made out in each transaction?

A. Three of them, I think.

Q. And which one did the customer get?

A. The original.

Q. The white one?

A. The white one.

Q. And which one was retained in Chicago?

A. Then this one would be the one that would be kept by the Chicago office.

Q. That would be the yellow one. And then would there be one of another color that was kept?

A. No, it was a yellow one that came to us, too.

Q. In the same form as the yellow here?

A. Yes, same form, yes.

Q. But the customer got the white one?

A. Yes.

Q. And showing you then these exhibits again, I will ask you whether they are the original confirmation slips which were made out in connection with the sale to Mrs. Ruth Chase Donaldson, the plaintiff, whether you can identify them as such.

A. Well, that would indicate the original with Douglas Carman's name signed there.

[fol. 143] A. Yes.

Q. Then you are familiar with it?

A. I know it, yes.

Q. The other one has been produced by Mr. Palmer as the one that relates to this transaction, the yellow one.

Mr. Palmer: Yes, I believe that relates to this transaction.

Q. And the one is a carbon of the other, is it not?

A. Yes.

Mr. Streissguth: Now we offer the Plaintiff's Exhibits R-1 and R-2. They are offered in connection with this transaction.

Mr. Palmer: Oh, I think I have no objection.

The Court: They will be received.

Q. Just one or two explanations with reference to this Exhibit R-1. It bears in typewriting the figures 538785. What significance have the figures 53?

A. 53 was the number of the Minneapolis office.

Q. And the initial S?

A. Sale.

Q. And the number 785?

A. That was the number of the order from a certain period. It might have been from the first of the year.

Q. That was the Minneapolis serial number?

A. Yes.

Q. And I call your attention to the fact that it reads there, "We have purchased for your account," whereas the office retained copy recites, "Sold to." There is a discrepancy [fol. 144] there. The confirmation to the customer indicates a purchase for her account and the private record indicates it is a sale.

Mr. Palmer: Now, if the court please, I understood that this R-1 is identified, not as a duplicate of the confirmation, but as the slip that was transmitted and shipped with the security.

Mr. Streissguth: It couldn't be. You produced it.

Mr. Palmer: I produced it, certainly, but I produced it as such a slip because it seems to me that was such a slip.

The Court: I think she testified it was a confirmation of sale.

Mr. Palmer: I think the matter can be taken up on cross examination.

Mr. Streissguth: Will you also produce, Mr. Palmer, the shipping slip which is the fourth copy?

Mr. Palmer: If the court please, the yellow slip I produced is the shipping slip. It is not a duplicate of the R-1, which is the confirmation. I think that appeals clearly from the face of the exhibit. I apparently have no duplicate in my file of the confirmation. So I will offer to Mr. Streissguth what he has already identified and offered as Plaintiff's Exhibit R-1 as my file copy of the shipping slip.

Mr. Streissguth: Very well.

Mr. Palmer: I was mistaken in handing this yellow slip to Mr. Streissguth as a duplicate of the confirmation.

Mr. Streissguth: Don't you admit that these two exhibits, [fol. 145] R-1 and R-2, were made with the same impression of the typewriter and that the one is the carbon of the other?

Mr. Palmer: I don't know, Mr. Streissguth.

Q. Is that the fact?

A. That is the fact because the man from the Chicago office——

Mr. Palmer: Now, just a minute, please. I move that so much of the answer as has been given by the witness be stricken for the purpose of interposing an objection. I shall object to this question on the ground that no foundation has been laid. Miss Chapman has not been shown to be an officer—in the office or an employee of the Chicago office and she is in no position to say whether that is made by the same typewritten impression.

Q. Miss Chapman, in the course of your instructions as cashier state whether or not you were taken to Chicago and mechanics of these matters were explained to you, the bookkeeping, or whether it was explained to you by Mr. Wells of the Chicago office.

A. You mean if I went to Chicago?

Q. Or whether you were instructed on the mechanics any place.

A. Yes, I was on the mechanics.

Q. By whom?

A. Mr. Oliphant.

Q. Mr. Oliphant?

A. Right.

Q. Are you acquainted and do you know the mechanics with reference to the preparation of these yellow slips and [fol. 146] the white slips, the so-called confirmation, and the so-called yellow slips, such as R-1?

A. Yes, they made——

Mr. Palmer: Now, just a moment, please. If you are going ahead and testify with reference to those exhibits I shall object again on the ground of lack of foundation. There is no sufficient foundation here shown that she knows.

The Court: I think she should testify as to that part she had to do and what she knows about the office here.

Mr. Streissguth: If she knows the office routine and has been schooled in it, I think she is capable to testify as to that.

Mr. Palmer: There is no such foundation laid, your Honor, as I recall it.

The Court: As I understand she has already testified one copy was given to the purchaser.

Mr. Streissguth: I think so. We will let it ride at that. Now, Mr. Palmer, will you produce the other carbon that you have there, pertaining to this transaction?

I will have you mark as Exhibit R-3 the security ticket given me by Mr. Palmer.

(Plaintiff's Exhibit R-3 is marked for identification.)

Q. Now I will show you Exhibit R-3. What is that commonly known as? Mr. Palmer refers to it as a security ticket. Is that what you designate it as, or have you some other name for it?

A. Well, I would call it the shipping ticket, but there [fol. 147] should be an orange colored one that came to our office with a—in this form.

Q. A form with the same printing?

A. Yes, the lower part was not on here.

Q. Well, all right. You got one and one was retained at Chicago?

A. At Chicago.

Q. And state whether that was also a copy of the Exhibit R-1, carbon copy of a portion of R-1.

A. Yes, that is a copy of it.

Mr. Streissguth: Mr. Palmer, you produced this. Would you care to say what it was, the record of the Chicago office or the Minneapolis office?

Mr. Palmer: I am not prepared to lay any foundation for it, Mr. Streissguth.

Mr. Streissguth: You produced it.

Mr. Palmer: I produced it, yes.

Mr. Streissguth: We offer Exhibit R-3, the so-called security ticket.

Mr. Palmer: I shall object to Exhibit R-3 on the ground no foundation has been laid for its introduction into evidence.

Mr. Streissguth: It was produced by Mr. Palmer as one of the office records relating to this transaction and has been identified by this witness as the security ticket which relates to this same transaction.

Mr. Palmer: I produced what resembles what Mr. Streissguth has called for in his notice to produce, but the mere production of the document doesn't in any way lay the foundation for its introduction into evidence. I believe the authorities sustain me on that proposition and I am pre-

[fol. 148] pared to present them or present the question at such time as the court sees fit.

The Court: Supposing I receive it subject to the objection and take your argument later, along with your other matters.

Mr. Palmer: That is perfectly satisfactory, your Honor.

Q. Now, on this shipping or security ticket, so-called, there are a series of three numbers, F-53870, F-57697, F-57746, for one share, three shares and four shares, respectively, and it shows the name "George Stotz, Jr., Will you tell the court what significance those numbers and those figures and that name have on that security ticket?

A. Well, those would represent the numbers of the certificates issued in the name of George Stotz, Jr.

Q. So-called street certificates?

A. Street certificates.

Q. Which were shipped in connection with this matter?

A. Yes.

Q. Now, what was the practice of the office, the Minneapolis office, in reference to deliveries of these Chase units to purchasers? Was that done in more than one way, and, if so, explain the different ways in which these matters were handled.

A. A large percentage of the purchases of Chase stock made through our office were sent direct to the customer, or to his bank, but we would have some shipments come [fol. 149] in in street form, of course, against payment.

Q. You mean come into the McKnight Building office?

A. Yes.

Q. And how were those delivered?

A. Well the salesmen would usually call the customer up and ask him to come up to the office and they would make payment.

Q. Now, did you maintain in Minneapolis a bank account? Did the Chase Securities Corporation maintain a bank account?

A. No, we did not.

Q. Did they keep at this time a safety deposit box?

A. No.

Q. At the end of the day's business, if you had any stocks and bonds, stock certificates or bonds in your possession in the Minneapolis office, how were they handled over night?

A. I would ship them to myself, or ship them to Chase Securities, Minneapolis office, by registered mail.

Q. You would write a letter to yourself?

A. That is right.

Q. And deposit them into the postoffice, registered and insured?

A. Yes.

Q. And the next morning it would be delivered back to you in the office?

A. Yes.

Q. Is that the way you handled your securities?

[fol. 150] A. That is right.

Mr. Palmer: The postoffice was your bank then, wasn't it?

The Witness: Well, it was the safest one you could have.

Q. Did you maintain a telephone, a local telephone, in the office?

A. Yes, we did.

Q. Was that listed in the name of the Chase Securities Corporation?

A. It was.

Q. And was the name Chase Securities Corporation on the door?

A. Yes.

Q. Did you advertise in the local newspapers?

A. Yes, we did.

Q. Did you pay personal property taxes in the state of Minnesota? When I say you, of course I mean the Chase Securities Corporation.

A. Well, I wouldn't know. All I recall is the assessor coming in, but of course he probably sent it to the Chase Securities Corporation, New York.

Q. You recall the property was assessed, the personal property in the office?

A. I don't know. You see, I never—I didn't pay the tax, and we had no record of it.

Mr. Streissguth: Am I going to have to call in the treasurer, or will you admit it at this time?

Mr. Palmer: I am prepared to produce receipts, Mr. Streissguth.

Mr. Streissguth: Will you produce them at this time?

[fol. 151] Mr. Palmer: Yes.

Q. Besides being listed in the telephone directory, was your company also listed in the city directory so-called?

A. Yes, it was.

Q. Besides selling Chase units, were other stocks and bonds sold?

A. Yes.

Q. And delivered to customers in Minnesota through your office?

A. Yes.

Q. Now, can you give us some estimate as to how many transactions of this type in Chase units there were in the year 1929 with customers in Minnesota and deliveries in Minnesota?

Mr. Palmer: You mean with customers or where they dealt with customers and followed by this special delivery here by the office?

Mr. Streissguth: I want to show that this was one sale in the course of repeated sales, so as to be prohibited by the Blue Sky Law. Are you ready to admit that? That is the purpose of this examination.

Mr. Palmer: Of course our position is that the sales were not consummated here. The sales were made and consummated——

Mr. Streissguth: I am asking her how many transactions with Minnesota people through these mechanics or mechanics similar to this there were in 1929, whether you call it a Minnesota sale or Illinois sale—we won't argue about it—but similar transactions.

[fol. 152] Mr. Palmer: I shall object to that on the ground that no foundation has been laid.

The Court: She may state from her own knowledge, of course.

Q. From your own knowledge.

A. In the year 1929?

Q. 1929.

Mr. Palmer: I shall object to that if it is not confined up to the time of this transaction on the ground that it is immaterial. I think that question should be confined to the period prior to August 10, 1929.

Mr. Streissguth: No, your Honor, our purchase may be at the beginning of a series or at the end of a series. If

it was the custom of continued and repeated sales it is a violation of law.

The Court: Overruled. She may answer. Cross examination may bring that out.

A. Well, I can't, you know, definitely give you them.

Q. No, I don't expect you can say so with exact definiteness, but approximately.

A. I would say around 500 orders.

Q. About 500 separate transactions?

A. Within that period that you speak of.

Q. Now, did you have in your office a Paid stamp, a rubber stamp with which you marked these different tickets Paid?

A. When the customer came into the office and paid for the security which I delivered to him?

Q. That is right.

A. Yes.

[fol. 153] Q. What use did you make of that rubber stamp?

A. I used it for that purpose.

Q. When payments were made at your office?

A. Yes.

Q. And how did you transmit the money in such a case to the Chicago office? You say you had no Minneapolis bank account.

A. We would get a draft.

Q. You would buy a draft?

A. Yes, at the bank.

Q. Now, were there any visits made by the officers of the Chase Securities Corporation to the Minneapolis office from time to time?

A. Yes, there were.

Q. And during that time who were the men that came from the Chicago office or the New York office?

A. Mr. Schuyler B. Terry, vice president from the Chicago office, and Charles C. Wells, district sales manager at that time from the Chicago office, and Mr. Oliphant, he was deputy treasurer.

Q. Did Mr. Terry ever come?

A. Mr. Terry? Oh, yes.

Q. And whether these men from time to time brought with them a list of the prospective purchasers residing in Minnesota which they handed to the salesmen?

A. Yes, they did.

Q. Now, what record did you keep, permanent record in the form of a ledger entry or anything of that kind, as to the particular customer's account? Did you keep a [fol. 154] customer's card index of some kind?

A. Yes, I kept a holding card.

Q. A holding card?

Mr. Streissguth: Will you produce the holding card? This is marked "Copy of the Original," but Mr. Palmer says it is a correct copy of the original and we make no point on this not being the original.

Mr. Palmer: I don't make any point.

Mr. Streissguth: I say I don't make any point. You shouldn't make any point.

Mr. Palmer: I say I assume it is a correct copy and I am not going to object on the ground that it isn't a correct copy.

Mr. Streissguth: Now, here is a record card which I will have marked.

(Plaintiff's Exhibit S is marked for identification.)

Q. The record card of Ruth Chase Donaldson has been marked Exhibit S. Did you keep such a card in the case of customers of the Minneapolis office?

A. Yes.

Q. And as purchases were made through the Minneapolis office of stocks and bonds were the records kept in that form in the Minneapolis office?

A. Yes.

Q. And in the case of Mrs. Ruth Chase Donaldson was the record in this form?

A. Yes.

Q. The form of this Exhibit S?

A. Yes.

Q. And whether or not this is the original, of course, you [fol. 155] would not say. It is marked "Copy of the Original."

A. Copy.

Q. And did you keep those records yourself?

A. Yes, I did.

Q. That was part of your job.

Mr. Streissguth: We offer Exhibit S in evidence.

Mr. Palmer: We have no objection, but defendant asks leave to submit and file in place of this exhibit a photostatic copy. Could that be understood, Mr. Streissguth?

Mr. Streissguth: We have no objection.

The Court: You haven't the original?

Mr. Palmer: Pardon me?

The Court: You haven't the original?

Mr. Palmer: No, that is the only file copy we have as far as I am informed.

The Court: Well, this may be returned to you and the photostatic copy substituted. Received.

Mr. Palmer: It is the only record copy we have.

Q. You mentioned Teletype. Besides Teletype did you have any private telephone connection with the Chicago office or was that all done by Teletype?

A. We had a Postal telephone that we could call Chicago on.

Q. A Postal telephone?

A. Yes.

Q. Direct connection?

A. Yes.

Q. How did you get quotations from Chicago?

[fol. 156] A. We either got them by wire over the Teletype or we often got them by telephone.

Q. Now, in cases where a customer placed an order for stocks in the market, how soon after that order was received at the Minneapolis office did you know what the market price was as applied to that particular sale?

A. Well, we usually knew what the market price was right along, but we couldn't of course say what that stock, that order would be confirmed at.

Q. Would the confirmation in the first instance be by telephone or Teletype?

A. The confirmation? Yes.

Q. So that it wouldn't be long after an order was received at the Minneapolis office before you could quote the confirmed price?

A. Well, if it was late in the afternoon we couldn't until the market opened in the morning.

Q. But otherwise in the course of the day could you get early responses?

A. Yes.

Q. Now, from those records, one of these records, it appears that this particular order was phoned in and not

mailed in. What would that indicate as to the time of day that that order was received?

A. You mean received by us?

Q. Yes, and transmitted by phone.

A. Well, it would be presumably from the fact that I had written "Phoned" on it, it would have been say before two [fol. 157] o'clock in the afternoon, but I can't say definitely the time.

Q. Did you receive the price, the market price, on that same phone conversation?

A. Yes, I probably did.

Q. Where you phoned in an order would they quote the price?

A. Oh, yes, they would give us the information on any price that we wanted.

Q. I see, that is what I was getting at. So when an order was phoned in you immediately knew what the price was at which it was confirmed?

A. Yes.

Mr. Streissguth: Now, John, you say you have that tax receipt?

(Plaintiff's Exhibit T is marked for identification.)

Mr. Streissguth: We offer Plaintiff's Exhibit T, receipt for personal property taxes for 1929, Chase Securities Corporation, 528 McKnight Building, and we offer the photostat at the suggestion of counsel in lieu of the original.

Mr. Palmer: No objection, your Honor.

The Court: It may be received.

Mr. Streissguth: I think that is all at this time.

Cross-examination.

By Mr. Palmer:

Q. Miss Chapman, when the phone call was placed to the Chicago office and the price obtained from the Chicago office, was it the practice of your office to call the customer and advise them of the market price at which the stock was [fol. 158] selling?

A. Not unless they had requested it.

Q. Do you now recall of your own knowledge whether such a request was made in this case?

A. No, I do not.

Q. Now, you have testified that there was a Teletype connection between the Minneapolis office to Chicago by way of Milwaukee. Now, was there a Teletype between the offices in the year 1929 and for the period up to August 10, 1929?

A. No, there was not.

Q. During that period of time in 1929, up to the time of this transaction on August 10th, there was no direct telephone connection with Chicago either, was there?

A. No.

Q. There was no direct wire?

A. No.

Q. As I recall your testimony, you said that during the period of 1929 you recall that there were about 500 transactions handled by the Minneapolis office, I believe. Now, did your estimate include transactions which involved stocks and securities other than that of the Chase Bank and Chase Securities Corporation?

A. No, that just includes the Chase holdings.

Q. It just includes——

A. The Chase purchases.

Q. The Chase Bank purchases?

A. Yes.

Q. Did your figure include transactions in 1928, your estimate?

[fol. 159] A. Yes, I think it did.

Q. So your estimate of 500 different transactions includes transactions handled from the time you entered the employ of the company in 1928 up to the time of this transaction in 1929?

A. Yes.

Q. Now, your estimate of 500 different transactions is not based upon your knowledge of any figure or records of the company, is it?

A. Well, you see, I kept the holding card of the security as well as the customer, and I merely in my mind estimated the number of cards that I had under Chase Bank stock.

Q. So your estimate is——

A. It is a very rough estimate.

Q. Now, with respect to the transmission of funds to Chicago, in the majority of cases wasn't it true, Miss Chapman, that the security was mailed direct to the customer and the customer remitted to the Chicago office directly?

A. In the large percentage of cases it was true.

Q. It was——

A. In the period of time in which you are talking.

Q. In the period which I am talking about?

A. Yes.

Q. That is from 1928 when you first entered the employ of the company, up to the time of this transaction with Mrs. Donaldson on August 10, 1929?

A. Yes, but might I qualify that?

Q. Certainly.

[fol. 160] A. Many times the customer would come in and pay at our office and the securities were then shipped direct to him or to his bank. We received many payments but they would always be by check.

Q. They would always be by check?

A. Occasionally cash.

Q. And then you would remit the customer's check?

A. To Chicago.

Q. For him to Chicago?

A. That is right.

Q. Miss Chapman, calling your attention to Plaintiff's Exhibit R-2, I will ask you to read the matter in print at the bottom of that exhibit. Can you read it?

A. Yes.

Q. Now, having read that matter in print on Plaintiff's Exhibit R-2, isn't it now your best judgment that that was the shipping memorandum or the memorandum that was shipped with the security to the customer or to the customer's bank?

A. Yes, that was—went out of the Chicago office. We never received tickets like that with that notation at the botom; always were blank.

Q. So that Plaintiff's Exhibit R-2 is the shipping memorandum rather than a copy of this so-called confirmation Plaintiff's Exhibit R-1?

A. May I tell you what I understand how they made these copies? Or don't you want me to?

Q. Just answer my question first and then possibly we will get to that later.

[fol. 161] A. Well, this is the shipping copy that went with the securities.

Q. So that is the shipping, or what may be identified as the shipping memorandum that went with the securities?

A. Yes.

Q. Now, calling your attention to the salesman's sales order, identified here as Plaintiff's Exhibit Q, I will ask you if the matter which you entered upon this was not taken down by you at or near the time of the transaction which this is a record of?

A. Yes, as soon as I received the order, as I was given the order I wrote that up.

Q. Yes. And who was it that dictated to you or told you what to fill in upon that order?

A. Well, in this case it was Mr. Devine who told me to write an order for eight shares.

Q. Yes. And so far as you know this salesman's sales order is a true and correct memorandum of the transaction which it purports to evidence, isn't that right?

A. Yes.

Q. Now, if Mr. Jepson had any connection with this transaction in the usual course of your business, wouldn't Mr. Jepson's name appear upon the salesman's sales order in the space reserved for salesman?

A. No, he would not have because he was not working out of our office.

Q. Well, would there be any record in your office which [fol. 162] would show that Mr. Jepson was entitled to any kind of a commission or any share in the commission on this deal?

A. I doubt if there would be any record there. It would all be over the telephone.

Q. I see. Now, you have said, I believe, in the one or two transactions where Mr. Jepson had a connection with a sale to a Minnesota customer that the communication of Mr. Jepson's connection with the transaction would come to you from Chicago, would it not?

A. Yes, it would.

Q. Therefore the Chicago office would have some record, would it not, of Mr. Jepson's connection with the transaction?

A. Yes.

Q. Well, now, calling your attention to Plaintiff's Exhibit R-3, identified here as the Chicago office security ticket, I call your attention to the name of the salesman appearing upon that record. Now, the name there appearing on R-3 is Mr. Devine, is it not?

A. Yes.

Q. Mr. Jepson's name doesn't appear upon that record, does it?

A. No, it doesn't.

Q. If Mr. Jepson had any connection with this transaction his name would appear upon this Chicago record, don't you think?

Mr. Streissguth: Just a moment. Objected to as calling for a conclusion. We can establish that he did have a connection.

[fol. 163] Mr. Palmer: Well, if the Court please, I am just asking for this information in the course of her business. She has testified on the subject.

The Court: She may anwer so far as her knowledge is concerned.

Mr. Palmer: Oh, I don't think it is a matter of any particular significance. I can withdraw that question.

Q. Now, you have testified that in the course of handling a transaction the order would be transmitted to the Chicago office; the Chicago office would then wire New York and New York, after procuring the security, would send it back to the Chicago office. Now, so far as the Chicago office was connected with the transaction, you have no personal knowledge of the connection which the Chicago office had with this transaction and you have no knowledge of the connection of the New York office with this transaction, do you?

A. I don't understand. You mean that I don't know that it took place, that they had any communication regarding the order?

Q. I mean so far as your position, your connection with the Minneapolis office is concerned, you yourself have no personal knowledge of what the Chicago office did or what the New York office did with regard to this transaction?

A. Only—no, I didn't, only that I have been told what they did by officers of the company.

Q. Now, Mr. Devine was connected with the Minneapolis office at the time of this transaction, was he not?

A. He was.

[fol. 164] Q. His title at the time of this transaction was that of representative, wasn't it?

A. Yes.

Q. He was not called the office manager, was he?

Mr. Streissguth: Referring to any particular time?

Q. I am referring to the time here in suit.

A. He was office manager too, yes.

Q. Was he so entitled at that time?

A. He was entitled as representative but he was in charge of the office.

Q. But he was in charge of the office?

A. Yes.

Q. Now, were you employed as Mr. Devine's secretary? Was that your title or connection with the office?

A. Yes.

Q. Now, when was it that you left the employ of the Chase, Harris Forbes Corporation?

A. October 15, 1931.

Q. So far as you know the Chase, Harris Forbes Corporation was still in business at the time you left the company in 1931, wasn't it?

A. Yes, it was.

Q. And so far as you know it continued in business for some time after that?

A. Months, not years.

Q. Well, for some time after that?

A. Yes.

Q. You aren't able to state exactly how long, are you?

[fol. 165] A. No.

Mr. Palmer: That will be all.

Re-direct examination.

By Mr. Streissguth:

Q. Just a few questions. You testified already, Miss Chapman, about some 500 transactions in Chase units during 1928 and 1929, you said in answer to Mr. Palmer?

A. Yes.

Q. You meant over the period beginning when you started in 1928, the balance of 1928?

A. Yes.

Q. And all of 1929, is that what you meant?

A. Yes.

Q. Now, in reference to the distribution of these sales over the entire period of time what can you say as to that?

Mr. Palmer: I shall object to that, your Honor, as immaterial and irrelevant.

Mr. Streissguth: Just to show that they were continuous and over that entire period of time.

Mr. Palmer: I don't believe it is relevant.

The Court: Oh, let her give her knowledge of it.

Q. Go ahead.

A. As to the——

Q. Whether they were distributed over that entire period or not.

A. Yes, they were.

Q. That is what I am getting at. Now, did the Minneapolis office or your salesmen at any time repurchase any of [fol. 166] these Chase units from the customers?

Mr. Palmer: If the Court please, I shall object to that as incompetent and immaterial.

Mr. Streissguth: That is on the issue of doing business within the state.

The Court: She may answer, giving her knowledge, not what somebody may have told you.

A. Yes, we repurchased, the salesmen did.

Q. They repurchased?

A. Repurchased the stock.

Q. At a quoted price, or how do you mean?

A. Well, depending on the day's price.

Q. Was there any rule in reference to that matter?

A. No, in the period of time in which you are talking you know there was very little buying of stock from customers.

Q. Repurchases there were very few?

A. Yes.

Q. Now, Mr. Palmer has mentioned or asked you in reference to being secretary to Mr. Devine, the representative. By whom was your salary paid and the commissions of agents?

A. We were paid from the Chicago office.

Q. Of what company?

A. Chase Securities Corporation.

Mr. Streissguth: Now, Mr. Palmer, I will ask you to produce the original lease for these offices. We don't have to put that in the record, if you will stipulate.

Mr. Palmer: If the Court please, I have here in response [fol. 167] to counsel's notice to produce a purported lease running from the Chase Securities Corporation——

Mr. Streissguth: Running to.

Mr. Palmer: Running from the Northwestern Bank Building Company to the Chase Securities Corporation. Now, I haven't had a chance to look over this particular exhibit and I don't know whether it has any bearing upon the issues here or not, but I think at the recess time we might look it over and see if this is the lease which responds to the notice to produce.

Mr. Streissguth: It is not. I can tell you that now.

Mr. Palmer: Then give me an opportunity at recess time to look further through my file and see if I can get the one you want.

Mr. Streissguth: Yes, and I don't care for the full lease if you will just stipulate that the lease ran in the name of the Chase Securities Corporation.

Mr. Palmer: All right. We can probably do that. I would like to see the lease before I stipulate.

Mr. Streissguth: So would we. I think that is all with Miss Chapman. Just a minute. I think that is all, Miss Chapman.

(Witness excused.)

(Recess.)

(Plaintiff's Exhibit U is marked for identification.)

Mr. Streissguth: Counsel, at my request, has produced [fol. 168] Plaintiff's Exhibit U, a photostatic copy of a lease dated September 21, 1928, between the S. T. McKnight Company and Chase Securities Corporation. I have consented to the use of the photostat in place of the original and now offer Exhibit U.

Mr. Palmer: We have no objection, your Honor.

The Court: Received.

Mr. Streissguth: Will you produce those three stock certificates?

Mr. Palmer: I don't believe I have those certificates, Mr. Streissguth.

Mr. Streissguth: Can you produce them?

Mr. Palmer: I will do my best to do so, Mr. Streissguth.

Mr. Streissguth: Will it be admitted that the original certificates issued in street form——

Mr. Palmer: Yes, it will be so admitted.

Mr. Streissguth: —as indicated by this receipt?

Mr. Palmer: As indicated by the receipt in the form of the Bankers Trust Company receipts.

Mr. Streissguth: Then it is now stipulated, your Honor, that the original eight shares of stock which were delivered to the plaintiff by the defendant through the First National Bank were in street form, being certificates No. F-53870 for one share, certificate 57697 for three shares, and certificate No. F-57746 for four shares, all being in street form and in the name of George Stotz, Jr. And will it be further stipulated that these three stock certificates were converted later into the one Bankers Trust certificate for eight shares which has been marked and received into [fol. 169] evidence here?

Mr. Palmer: I will so stipulate, but I would like to reserve the right to make any corrections which my records show necessary in regard to the numbers which have been read into the record.

Mr. Streissguth: It may be so understood.

The Court: It may be corrected if you find that there was an error there.

Mrs. Ruth Chase Donaldson, the plaintiff, sworn in her own behalf, testified as follows:

Direct examination.

By Mr. Streissguth:

Q. You are the plaintiff in this case?
A. I am.
Q. And the wife of Mr. Frank Donaldson?
A. I am.
Q. What is your home address?
A. My present home address?
Q. Yes.
A. 4807 Sheridan Avenue South.
Q. And where did you live in the year 1929?
A. At 4615 Emerson Avenue South.
Q. In this city?
A. In this city.
Q. And what was your maiden name?
A. Ruth Chase.

Q. And your father's name?

A. Charles W. Chase.

Q. And state whether or not your father had an office in [fol. 170] the McKnight Building conducted by him under the name of the Chase Investment Company.

A. He did.

Q. And whether or not your father handled your financial transactions through this account known as the Chase Investment Company account.

A. Yes, he did.

Q. That was not a corporation?

A. No, it was not. It was just a holding company, family holding company.

Q. Now, Mrs. Donaldson, state whether or not in the month of August of the year 1929 you were solicited by anyone in connection with the purchase by you of Chase National Bank stock and stock of the Chase Securities Corporation.

A. Yes, I was solicited by Mr. Weir Jepson.

Q. Weir Jepson?

A. Yes.

Q. Now, was Mr. Weir Jepson an acquaintance and friend of yours and your husband's?

A. Yes, he was.

Q. And where did he live at that time?

A. He lived in Sioux City, Iowa.

Q. And did you know at that time any other salesmen of the Chase Securities Corporation?

A. I did not.

Q. Did you know Mr. Owen Devine?

A. No, I don't know him now.

Q. You don't know him now. Have you ever had any negotiations with him at all in respect to this Chase Bank stock?

[fol. 171] A. Never that I know of.

Q. Did you ever know Mr. Maurice Angland?

A. No, I never did.

Q. Who was connected with the Chase Securities Corporation?

A. No.

Q. Did you ever have any dealings with him?

A. I never have.

Q. With whom were your dealings in regard to the purchase of Chase National Bank stock and Chase Securities stock?

A. My dealings were entirely with Mr. Jepson.

Q. With Mr. Jepson. Where was it Mr. Jepson first spoke to you about purchasing this stock—I am going to call it Chase stock or Chase units, by that I mean the combined stock of the Chase National Bank and Chase Securities Corporation, but for brevity I will refer to it as Chase stock or Chase units.

A. Yes.

Q. Where was it Mr. Jepson first talked to you about these Chase units?

A. At my home, 4615 Emerson Avenue South.

Q. Who was present at the time of that conversation?

A. Mr. Donaldson was present.

Q. Your husband?

A. Yes.

Q. And anyone else?

A. Not that I recall. I don't know. I am very sure there wasn't.

[fol. 172] Q. Will you tell the court, and speak loud enough so the judge can hear you, just what your conversation was with Mr. Jepson in respect to purchasing these units?

Mr. Palmer: I shall object to this, your Honor, on the ground of no foundation, incompetent and hearsay, and there has been no showing that Mr. Jepson is connected with the defendant corporation.

Mr. Streissguth: I am not admitting counsel's premise because Miss Chapman has already testified that he was an agent of the Chase Securities Corporation working out of Sioux City, but outside of that, assuming that he was unauthorized, the result of his negotiations with Mrs. Donaldson has been established and confirmed by the principal, and the principal is bound by the acts of his unauthorized agent, assuming he is unauthorized. That is elementary.

The Court: Overrule the objection.

Q. Just tell the court what was said between you at that time.

A. Mr. Jepson came out to our house and he told me that the Chase National Bank was the biggest bank in the United

States; that it had the tremendous funds both known and unknown to the public; that it had a book value, the same value as National City Bank Company, which was selling at perhaps twice as much money and that the stock should appreciate in value and that it would be a very good buy. Under those circumstances I told him that I gave him the [fol. 173] order to buy me some stocks, you know, from the—at the market price.

The Court: Just a minute.

(The answer is read by the reporter.)

Mr. Palmer: Before we go on with another question, may it please the court, I should like to move to strike the answer of the witness on the ground it is not relevant to the issues in this case; that it is incompetent and immaterial and I am renewing the same objection of lack of foundation which I made at the outset, to-wit, there is no connection between Mr. Weir Jepson and the defendant corporation that has been shown.

The Court: Well, the objection will be overruled and if it is agreeable to counsel the testimony may go in subject to your objection without being obliged to renew your objection.

Mr. Palmer: Yes, your Honor, I would appreciate it if that could be understood.

The Court: It may be understood.

Mr. Palmer: Will that be all right with you, Mr. Streissguth?

Mr. Streissguth: Yes, that is perfectly satisfactory.

Mr. Palmer: May it be understood at the conclusion of the evidence we may make a motion to strike upon these grounds or all other grounds that might appear to be proper?

The Court: You may.

Q. Was there any discussion at that time as to how the price was to be determined, whether the price was listed or how it was sold?

[fol. 174] A. Mr. Jepson told me what the market price had been on the previous day. This was after the market had closed. He said that he did not believe that the stock would go up materially the next day and I told him that if it did not go up a great deal that I would take—planning on

how much money I had—I would take eight shares of stock at the market price the next day.

Q. In that connection was there anything said as to how the market price was determined, whether the stock was a listed stock or not?

A. No, he didn't say, and I didn't presume that the—but what the stock would be listed. It never occurred to me but what the stock would be a listed stock. I thought the Chase Bank was a very large concern and naturally they would take care of any legal requirements that the state demanded.

Q. You spoke of a market price, Mrs. Donadson. That is what I am referring to.

A. Oh, pardon me.

Q. You say he told you what the market price was on that day?

A. The previous day.

Q. The previous day. And you said something to the effect that you would see what the market would open at?

A. The next day.

Q. How were you to find that out?

A. Well, he——

Q. What did he say about that?

A. They would let me know what the stock was going to [fol. 175] be the next day.

Q. What the stock was going to be?

A. What it would be, I mean, after the market opened. They would call me and let me know whether the stock—what the price of the stock was.

Q. Did he on the following day have any further conversation with you with reference to the market price?

A. I do not believe that he did. I think that I gave him the order subject to the fact that the stock did not change—vary more than about a half a point, or something of that sort.

Q. Now, in your discussion with Mr. Jepson, state whether or not he disclosed to you or told you that the stock was not registered for sale in Minnesota with the State Securities Commission? Did he make any mention of that fact?

A. No, he made no mention of that, and of course I——

Q. And state whether you assumed that the stock was being legally sold to you.

A. I assumed that it was.

Mr. Palmer: Now, if the court please, I don't want to repeatedly object under this general objection, however I don't like to have a matter that has nothing to do with this case come in. I shall object to this on the further ground it calls for a conclusion of the witness.

The Court: I will sustain the objection.

Q. I will put it in this form: You say he said nothing to you in reference to the stock being registered or not regis- [fol. 176] tered with the Minnesota Securities Commission?

A. He did not.

Q. Now I will ask you what you believed the fact to be in reference to the stock being registered and legally sold to you.

Mr. Palmer: If the court please, I object to that on the ground that it calls for an opinion and a conclusion of the witness in addition to the grounds which I have already urged.

Mr. Streissguth: It goes to her belief and reliance.

The Court: Of course there is no testimony of any condition whatever. There has been nothing to base that upon.

Mr. Streissguth: No, that is true, your Honor. It is this implied representation as to legality and registration. We have to show belief and reliance and of course if counsel objects and says belief is immaterial, if we want to adopt that theory that is very fine with us, but we assumed we had to show belief and reliance.

The Court: Of course if they were relying upon these statements it would necessarily follow that she could testify that she believed them to be true, but where there are no statements——

Mr. Streissguth: It is a negative situation.

The Court: Yes, entirely. I am just mulling it over in my mind whether more or less it wasn't a matter of argument rather than statements.

(Consultation of counsel.)

Mr. Streissguth: I will withdraw that question and put [fol. 177] this question to the witness:

Q. Mrs. Donaldson, at the time of this conversation at the time that you entered your order for eight shares of

Chase units, did you know that the stock of the Chase National Bank and the Chase Securities Corporation was not registered for sale within the state of Minnesota?

Mr. Palmer: I shall object to that, your Honor.

Mr. Streissguth: On what ground?

Mr. Palmer: On the ground that it is immaterial as a matter of law and not relevant to the issues in the case and calling for a conclusion directly contrary to the fact which she has already testified to.

Mr. Streissguth: May I ask counsel this question, do you claim in case of an implied representation it is not incumbent upon the plaintiff to show anything but the implied representation to establish the fraud and deceit?

Mr. Palmer: I can't answer your question, Mr. Streissguth

Mr. Streissguth: Well, you make an objection on that ground.

Mr. Palmer: It is not for me to answer you, sir. I am answerable to the court.

The Court: I will let her answer the question. Overrule that.

(The question is read by the reporter.)

A. I did not.

Q. Would you have entered this order and made this purchase had you known that the Chase unit, so-called, the [fol. 178] stock of the Chase Securities Corporation was not registered for sale in the state of Minnesota?

A. No, I would not.

Mr. Palmer: Now, if the court please——

The Court: Just a minute.

The Witness: Pardon me.

Mr. Palmer: I renew my objection previously made emphasizing that the question calls for an opinion and conclusion of the witness. This ground is urged in addition to the ground urged in the general objection heretofore made.

The Court: I am going to let her answer the question subject to perhaps reversal on my part later on.

Mr. Streissguth: If it is reversal, your Honor, it is reversal on the part of three other judges, Judge Loevinger, Judge Joyce and Judge Bell, who have all held the same way.

The Court: I am not so proud but what I sometimes do reverse myself if I am wrong.

A. No, I would not.

Q. Why do you say you would not have purchased the stock if you had known it was not registered?

Mr. Palmer: I renew my objection again as emphasizing the fact that it calls for a conclusion and opinion of the witness.

The Court: Is that material?

Mr. Streissguth: I think it is, your Honor, showing her reliance and belief.

The Court: She may answer.

[fol. 179] Q. You may answer your reasons.

A. I know that there is a Commission in the state of Minnesota whose duty it is to look into stocks, and only reliable stocks are registered and I was—wouldn't have bought a stock that I didn't consider—that I considered was a risky stock.

(The answer is read by the reporter.)

Q. Did you buy this stock for a permanent investment or not?

A. I bought it for a permanent investment.

Q. And do you still retain the stock?

A. I still own it, yes.

Q. Now, it appears from the evidence in this case that this friend, Weir Jepson, who sold you this stock, was not licensed as an agent in Minnesota. Now, did you know at the time that you made this purchase that Mr. Jepson was not licensed to sell stock in the state of Minnesota?

A. I didn't know it, no.

Q. And had you known that he was not licensed in Minnesota and that any sale by him within the state of Minnesota was illegal, would you have purchased this stock?

Mr. Palmer: If the court please, I renew my objections, emphasizing again that it calls for an opinion and a conclusion of the witness.

The Court: Yes, it is the same question.

Mr. Streissguth: In reference to the other feature.

The Court: She may answer the question.

A. No, I should not have bought it.

Q. And in buying this stock, as you say you did, in placing [fol. 180] your order for it, state whether you believed that the stock was being legally sold here. Whether you believed that it was legally being sold here.

Mr. Palmer: I shall renew my objection, your Honor.

The Court: Overruled.

A. I believed it was a legal transaction, yes.

Q. Now, you have made some reference, Mrs. Donaldson, to your father and this account that he maintained and known as the Chase Investment Company. Did you have a credit or any money to your credit in your father's office at that time?

A. Yes, I did.

Q. And how was payment of this stock made? Was it made by yourself or through your father's office?

A. It was made through the Chase Investment Company.

Q. Through the father's Chase Investment Company?

A. The Investment Company, yes.

Q. Did you yourself personally attend to that matter or was that attended to by the office?

A. That was attended to in the Chase Investment Company office.

Q. Now, in the course of time, after giving this order to Mr. Jepson, did you receive through the United States mail, a so-called confirmation slip which I now show you, Exhibit R-1?

A. Yes.

Q. And having received that did you advise your brothers [fol. 181] or your father with reference to paying for it?

A. Yes.

Q. And then in the course of time was there delivered to you Exhibit L, the so-called Bankers Trust Company receipt for eight shares?

A. Yes.

Q. You have seen that?

A. Yes.

Q. And where was that kept for safe keeping?

A. It was kept in the safety deposit portion of the Chase Investment Company, or the safe, I don't know.

Q. Kept at the downtown office?

A. Yes.

Q. And did you later that year receive a dividend of one share evidenced by this Exhibit M?

A. Yes, I did.

Mr. Streissguth: Now will you produce, Mr. Palmer, the correspondence with Mrs. Donaldson with reference to conversion in 1930 of the duplex?

(Plaintiff's Exhibit V is marked for identification.)

Q. Now, I will show you Exhibit V and I will ask you to look at that. Have you got glasses?

A. No, I think I can read it.

Mr. Streissguth: V is a letter of transmittal dated November 4, 1930, signed by Frank A. Donaldson as agent for Ruth Chase Donaldson.

Q. Now, if you have read it my question is whether about November, 1930, through your husband you converted these [fol. 182] original Bankers Trust receipts into one small certificate for nine shares, which we refer to as the duplex certificate?

A. Yes.

Q. And who attended to that for you?

A. Mr. Donaldson.

Q. Your husband?

A. Yes.

Mr. Streissguth: We offer exhibit V in evidence in conjunction into duplex certificates, Mr. Palmer.

Mr. Palmer: We have no objection, your Honor.

The Court: Received.

Q. And according to this exhibit the stock was then mailed to Mr. Frank A. Donaldson at 666 Pelham Street, is that the business address of your husband?

A. Yes.

Q. Did he keep the stock over there after that, do you know?

A. Yes, I believe he did.

Q. Then later in 1936 the form of stock was again changed and—where are those certificates—into the certificates that you now have?

Mr. Palmer: Haven't you them there?

Mr. Streissguth: Yes, I have them. I have the originals. You have the photostats. I suppose it won't be necessary for me to more than refer to the originals either.

Mr. Palmer: No.

Q. In 1936 was this signed certificate changed into two [fol. 183] other certificates?

A. Yes.

Q. One for eight shares in the Chase National Bank, which photostat has been marked Exhibit P, and one for one share in the Amerex Holding Corporation, which is marked Exhibit O, and do you still have those two certificates?

A. I have them, it is for nine shares, though, instead of eight, I think you said eight.

Q. For nine shares?

A. Yes.

Q. Well, that is the original that I gave you there?

A. They are.

Mr. Streissguth: Now counsel will, I think, stipulate that along with each share in this division, along with each share of Chase National Bank stock there was one-tenth of a share of Amerex Holding Corporation issued?

Mr. Palmer: It may be so stipulated, your Honor.

Mr. Streissguth: So that nine shares of Chase National Bank upon this slip would have entitled Mrs. Donaldson to nine-tenths of one share of Amerex?

Mr. Palmer: It may be so stipulated.

Mr. Streissguth: So that to complete the whole share it was necessary for her to purchase one-tenth of share of Amerex?

Mr. Palmer: I think that follows:

(Plaintiff's Exhibit W is marked for identification.)

[fol. 184] Mr. Streissguth: Now, may I have the correspondence in reference to this conversion?

(At this time a recess was taken until 9:30 o'clock A. M., May 10, 1939.)

May 10, 1939, 9:30 A. M.

RUTH CHASE DONALDSON resumed the witness stand.

By Mr. Streissguth:

Mr. Streissguth: Counsel has furnished me, upon demand, a letter from Frank A. Donaldson, dated January 29, 1930, asking for the reissuance of the street certificates into a regular certificate in the name of George Stotz, Junior.

Q. Mrs. Donaldson, state whether or not your husband took care of the matter of converting these original shares into the new shares from time to time.

A. He did, yes.

Q. Have you any personal knowledge of the writing of that letter or not? You may read it.

A. I never saw this letter, but I knew that Mr. Donaldson had written such a letter.

Mr. Streissguth: We offer Exhibit X to show the conversion of the street certificates into the first Banks Trust Company receipt.

Mr. Palmer: We have no objection, your Honor.

The Court: Received.

[fol. 185] Cross-examination.

By Mr. Palmer:

Q. Mrs. Donaldson, according to my notes, and the notes of the reporter, you testified that Weir Jepson was an old friend of your family; that is correct, isn't it?

A. I had known him personally for several years.

Q. Well, didn't you testify that he was an old friend of your family?

A. I perhaps did. He was a friend of my husband and myself.

Q. There isn't any question about that, is there?

A. No.

Q. How many years had you known him before he solicited you to buy this stock?

A. I think about six or seven years.

Q. Were your brothers, Elbridge, Chauncey, Charles and Kenneth, friends of Weir Jepson also?

A. I think they perhaps knew him. I don't believe they were very well acquainted with him, no.

Q. They did know him, however?

A. I think Elbridge did, anyway.

Q. Mr. Jepson was a friend of your husband as well as yourself, wasn't he?

A. Yes, we both knew him.

Q. You and your husband knew Weir socially, too, didn't you?

A. Yes.

[fol. 186] Q. Weir had married one of E. C. Warner's daughters, hadn't he?

A. No, sir.

Q. That isn't true?

A. Not to my knowledge. He married Leon Warner's daughter, the hardware store people.

Q. That is right; I was mistaken about that. Now, didn't you and your husband move in practically the same social set as Weir Jepson?

A. Yes, we knew them. Mrs. Warner was a very good friend of mine. Mrs. Jepson, I mean.

Q. Mrs. Jepson was a very good friend of yours?

A. Yes.

Q. Did Weir have a family at that time?

Mr. Streissguth: Objected to as immaterial.

Mr. Palmer: It isn't particularly material, your Honor. I would just like to show the friendly relationship between the families.

The Court: She may answer.

A. I will have to figure that out. Yes. He had one child, I think. Maybe they had two by that time, but only one was born in Minnesota. One was born after they moved down to Iowa.

Q. Weir's father and mother were Minneapolis people?

Mr. Streissguth: Objected to as immaterial.

The Court: It isn't very material, is it?

Mr. Palmer: Well, it isn't particularly material, except to show a circumstance in the family relationship. This is all preliminary, if the court please.

[fol. 187] The Court: If it is preliminary, she may answer.

A. Mrs. Jepson lived in Minneapolis, I believe; Mr. Jepson's mother.

Q. Mr. Jepson's family, or the family of Jepsons from which Weir came, were they Minneapolis people?

A: No, that is, his father was not. They came here from away. Weir hadn't been here very long until he married Audrian Warner.

Q. About the year before Weir came to you to talk about this Chase stock he had moved to Sioux City, Iowa, hadn't he?

A. I wouldn't be able to say how long before.

Q. Well, he had moved there some time before?

A. Yes, that is right.

Q. And he moved his family down there, too?

A. Yes.

Q. When Weir came to see you in August of 1929, he came out to your home, didn't he?

A. Yes.

Q. What time of the day did he call on you?

A. I think it was in the afternoon.

Q. About what time in the afternoon, do you remember?

A. No, but I think it was around 4 o'clock, perhaps. I couldn't swear to that, though.

Q. Was your husband home at that time of day?

A. Yes, he was.

Q. Do you remember about the day of the week that Weir came to see you?

A. I think we figured out that it was on a Saturday.

[fol. 188] Q. When Weir came to see you and when he was ushered in you greeted him in a friendly way, didn't you?

A. Yes.

Q. He was an old friend?

A. Yes, he was.

Q. Were there any members of his family with him when he came to see you?

A. No.

Q. He was alone?

A. He was alone.

Q. Was there anyone else with him when he came to see you?

A. No, there was no one else.

Q. Did you ask him how things were down in Iowa when he came in to see you?

A. I am sure I can't remember whether I did or not.

Q. Did you ask him how his wife liked it down in Iowa?

A. That is a thing that would be very hard to swear to. I imagine I asked him how she was, but I don't know

whether I asked him whether she liked it in Iowa or not. I am not sure of that.

Q. Well, do you remember having asked him anything about it, or his saying anything about that particular subject?

A. No, no, I don't remember anything about that.

Q. Did you ask him what line of business he was in down there in Iowa?

[fol. 189] A. I think I knew what line of business he was in.

Q. Well, do you remember his volunteering to tell you anything about the line of business he was in down there?

A. I remember his bringing up the subject of buying the stock.

Q. Well, did he get onto the subject of his particular line of business? Did he tell you he was working for the Chase Securities Corporation down in Sioux City?

A. Yes, I imagine he did. He must have been selling the stock if he told us that.

Q. You don't have any independent recollection of that?

A. His saying, "I am working for the Chase National Bank"?

Q. You mean Chase Securities Corporation.

A. Chase Securities Corporation; I don't remember his making that statement in so many words, no.

Q. Did you ask him how the family liked it down in Iowa?

Mr. Streissguth: Objected to as repetition.

A. I can't remember.

The Court: She answered that.

The Witness: I wouldn't be able to remember what personal questions I asked him.

Q. Did you ask him how business conditions looked down there in Iowa?

A. I don't suppose I did.

Mr. Streissguth: I object to any questions relating to [fol. 190] anything but the transaction here in question as immaterial.

Q. Do you remember his telling you anything about business conditions down in Iowa?

Mr. Streissguth: Objected to as immaterial.

The Court: Oh, she may answer. I don't see the materiality.

A. I don't remember saying in so many words how conditions were. Conditions were pretty good for everybody about those days, weren't they? Particularly anybody selling stock.

Q. Well, I think they were, as I recall it. Did you serve Weir with tea or coffee?

A. I can't remember that either. I imagine we probably gave him something, gave him a drink of something.

Q. You would do that?

Mr. Streissguth: Objected to as immaterial.

A. It was a warm day.

Q. You wouldn't violate the law like that, would you?

A. No, sir.

Mr. Streissguth: I object to counsel's remarks about violation of law. I don't know of any violation of law.

The Witness: I don't either.

Mr. Streissguth: I move the remark be stricken from the record.

The Court: It may be stricken.

Q. Well, now, Mrs. Donaldson, you don't remember much about this whole transaction right there in 1929, do you?

[fol. 191] A. Yes, I remember quite a lot about it.

Q. Weir was a good friend of yours. You don't remember whether you served him tea or coffee, you don't remember whether you asked him how business conditions looked down in Iowa, and, as I have it in my notes, you don't remember whether you asked him what business he was in; and, in fact, there are a great number of these things that you don't remember?

A. About this conversation? I can see what you are getting at all the time, but I didn't remember those things, so I had to tell the truth.

Q. That is right, Mrs. Donaldson. You don't remember those things now, do you?

A. What do you mean? Those questions you asked me?

Q. Yes.

A. I told the truth. You asked me certain questions which I answered as truthfully as I could. Is that what you want me to say?

Q. Well, I believe it is in the record already as to what your recollection was. Now, let me ask you this. Isn't it a fact that your recollection of what was said and what was done almost ten years ago with Mr. Weir Jepson on this occasion when he came to talk to you about the Chase stock is hazy in your mind?

A. I don't think that I would forget a transaction where I put up some money, because that makes a little difference to me.

Q. Well, now, didn't Weir Jepson tell you back there in 1929, that the market in this bank stock was going upwards; [fol. 192] booming upwards?

A. He told me that he thought it would go up from what it was then.

Q. And didn't you share the popular feeling at that time that everybody had that stocks were booming, that prosperity was here, and that you would go up on the upswing of the general trend of the market at that time?

Mr. Streissguth: That is objected to on the ground it is assuming a fact which is not in evidence. He said everybody was expecting it to go up. There is no proof of that.

The Court: I suppose that is taking in a little large territory.

Q. You remember what the popular feeling was about stocks back in 1929, don't you?

Mr. Streissguth: Objected to as immaterial.

The Court: She may answer. Overruled.

A. I remember what the feeling was?

Q. Yes.

A. Yes.

Q. And wasn't it the popular feeling at that time that stocks and bonds were going up in price?

A. I think perhaps it was. I had never bought any stock before.

Q. But you had heard other people talking, hadn't you?

A. Yes.

Q. And you had heard them talking about the stock market going up, hadn't you?

Mr. Streissguth: Objected to as hearsay and immaterial. [fol. 193] Mr. Palmer: I will withdraw the question.

The Court: I will sustain the objection.

Q. Didn't Weir tell you that the Chase Bank stock was going up on the market, and was going to go up?

Mr. Streissguth: Objected to as already answered, repetition.

The Court: She may answer.

A. He told me that it would appreciate in value. He also told me it would be a good investment.

Q. Didn't he tell you that you had better buy the stock then before it went up?

A. I don't remember. I imagine he might have, but I wouldn't be able to say about that.

Q. Didn't you buy the stock because you felt that it was going to go up, that you were going to make a profit?

Mr. Streissguth: That is objected to as immaterial, not tending to establish any defense.

The Court: Overruled.

A. I bought it for an investment.

Q. Do you mean by that that the matter of the rise in the price of the stock didn't make any difference to you?

A. I don't imagine anybody buys anything with a feeling that it is going down.

Q. Down in market price?

A. I intended to keep the stock. I didn't intend to wait a few days for it to rise, and sell, if that is what you mean.

Q. That isn't what I mean. I mean this, didn't you buy [fol. 194] the stock for the reason that you believed that, like all stocks, at that time it was going up in market value and would appreciate in market value?

Mr. Streissguth: That is objected to as assuming a fact not in evidence, that all stocks were going up at that time.

The Court: She may answer as to what her belief was.

A. I thought I would make a better profit on it than I would on bonds.

Q. Now, the Chase Bank stock did go up right up to the time of the crash in the latter part of October, 1929, didn't it?

A. Did it? I don't know.

Q. You don't know?

A. I bought it for an investment, and I don't believe I watched it as carefully as I might have, perhaps.

Q. Did you watch it at all in the financial pages of the paper?

A. I don't ever remember seeing a quotation that it was any different than what I paid for it. It wasn't listed, was it?

Q. Did you hear the testimony of Miss Chapman yesterday?

A. Yes.

Q. Do you recall her testifying that it was quoted on the over-the-counter market?

A. Yes, I remember she said that.

Q. Did you ever look at the over-the-counter quotations at about that time to see how it was doing on the market?

[fol. 195] A. Believe it or not, I don't remember ever seeing it.

Q. You say you bought this stock for investment purposes. Do you mean by that that you bought it because you expected the stock to earn dividends for you?

A. I knew it wouldn't earn a big dividend.

Q. You knew that?

A. Yes.

Q. But you expected it to earn some dividends for you, didn't you?

A. Yes.

Q. When you say you bought it for investment you mean you were going to hold the stock and take the dividends from it?

A. I also expected it to appreciate in value.

Q. You expected it to appreciate in value, and that was material to you because you thought that you would be able to sell it for more than you paid for it?

A. Yes, I think I probably thought that in a few years—I also thought the dividends might be increased.

Q. Then, when you say you bought for investment, Mrs. Donaldson, you mean by that two things, as I understand it; first, you mean that you expected the market value of the stock to go up and the stock to appreciate in value so far as the market was concerned, and then in the second place you expected the stock to earn dividends regularly for you, and you expected the dividend yield to increase? Is that what you meant——

[fol. 196] A. That is right.

Q. —when you say you bought the stock for investment? Now, up to the time of the crash in the market, which was

about the latter part of October, 1929, your Chase Bank stock did not go down in value, you knew that, didn't you?

A. I knew it?

Q. Well, didn't you have some knowledge on that score?

A. I may have. I expect I probably did. I don't remember that. At that time I hadn't any intention of selling it.

Q. Well, do you remember one way or the other whether the stock stayed at about the same level as when you purchased it in August of 1929 right up to the time of the market crash in the latter part of October or first part of November, 1929?

A. No, I don't know. I thought you said it went up.

Q. I say, do you remember whether it stayed at about the same level, or went up, or went down?

A. I don't know which it did.

Q. After the crash do you know whether it did go down in price?

A. No, I don't know if it went down immediately or not. Of course I know it went down eventually all right.

Q. All stocks did.

A. Yes. I know it went down, but I don't know whether it went down when everybody else went down, or not.

Q. Now, with regard to the matter of dividends, the stock [fol. 197] paid you dividends regularly each year, and has paid you dividends regularly right up to the time of this action, hasn't it?

A. I believe so. I know I have gotten dividends. I wouldn't say how regular they have been, but I think they have been regular.

Mr. Palmer: The exhibit I have had marked Defendant's Exhibit 2 are dividend checks purportedly issued to Ruth Chase Donaldson, commencing with a dividend check issued October 1, 1929; January 2, 1930; April 1, 1930; April 1, 1930, again; July 1, 1930, and October 1, 1930.

The Witness: After that they changed and only had them twice a year, didn't they?

Mr. Palmer: There are six separate checks affixed to Defendant's Exhibit No. 2.

Q. Calling your attention to Defendant's Exhibit No. 2, I will ask you if your signature appears endorsed upon the back of these dividend checks. You will find it by just taking down the edge of the paper there.

A. Yes, they are all signed by me.

Q. They are all endorsed by you?

A. Yes.

Q. Did you receive and cash and use these dividend checks marked Defendant's Exhibit No. 2?

A. I did.

Mr. Palmer: Defendant's Exhibit No. 2 is offered in evidence, your Honor.

Mr. Streissguth: No objection.

The Court: Received.

Q. Now, referring to Defendant's Exhibit No. 2, it ap-
[fol. 198] pears that the check dated October 1, 1929, was issued in the sum of $8; the check issued January 2, 1930, was issued in the sum of $8; the check dated April 1, 1930, was issued in the sum of $8; the second check dated April 1, 1930, was issued to you in the sum of $1. Do you remember, Mrs. Donaldson, whether that was the check which applied to your one-share dividend?

A. I expect it was, but I don't know. I suppose it was.

Q. Then, the check dated July 1, 1930, issued in the sum of $9, and the check issued October 1, 1930, also in the sum of $9; so, Mrs. Donaldson, you received as dividends on your stock in the year 1929 the sum of $8; and in 1930 you received the sum, according to this exhibit of $35?

A. That looks right.

Q. That sounds right to you, doesn't it?

A. Yes.

(Witness temporarily withdrawn.)

Henry J. Helgeson, sworn on behalf of plaintiff, testified:

By Mr. Streissguth:

Q. Have you given your name to the reporter?

A. Yes, sir.

Q. You are now employed by the First National Bank of Minneapolis?

A. Yes, sir.

Q. In what capacity?

A. Manager of the collection division.

[fol. 199] Q. The corporate name of the bank now is First National Bank & Trust Company?

A. First National Bank & Trust Company of Minneapolis.

Q. How long have you been employed by that institution in the collection department?

A. Since November 1, 1928.

Q. At that time what was the corporate name?

A. First National Bank of Minneapolis, Minnesota.

Q. In what department were you working at that time?

A. Collection department.

Q. Who was the manager of the collection department?

A. A. M. Rolfnes.

Q. And he is still the manager of the collection department?

A. No, sir, he is not.

Q. Are you at the present time?

A. Yes, sir.

Q. Are you familiar with the records of the First National Bank, particularly its collection department?

A. Yes, sir, I am.

Q. During the period involved here, which is August, 1929?

A. Yes, sir.

Q. Have you at the request of the attorneys for the plaintiff made a search for the records involved in this lawsuit?

A. Yes, sir, I have.

[fol. 200] Q. Have you found a letter from the Chase Securities Corporation of which I show you a copy?

A. No, sir.

Mr. Streissguth: Pursuant to notice to produce counsel for the defendant has given me a carbon copy of a letter from the Chase Securities Corporation dated August 15, 1929, addressed to the First National Bank of Minneapolis, which I now offer in evidence as Plaintiff's Exhibit Y.

Mr. Palmer: We have no objection.

The Court: Received.

Q. Now will you read that letter? That is the Chase copy.

Mr. Palmer: May it be understood a photostatic copy may be substituted?

Mr. Streissguth: Yes.

Q. Refreshing your recollection with this letter and your own records, do you now recall the transaction in reference to the Ruth Chase Donaldson purchase of Chase units?

A. I have records here. I don't recall that particular transaction, but I have records here that I think will bear that out.

Q. I will also show you another exhibit. The next exhibit is Plaintiff's Exhibit Z, letter from First National Bank to Chase Securities Corporation, dated August 16, 1929. I will show you Exhibit Z and ask you to read it. Do you recognize that letter?

A. Yes, sir.

Q. And the signature on its face is A. M. Rolfnes; in whose handwriting is that signature?

[fol. 201] A. That is my own handwriting.

Q. So that you signed the name of Mr. Rolfnes?

A. Right.

Mr. Streissguth: We offer Plaintiff's Exhibit Z in evidence.

Mr. Palmer: We have no objection, your Honor. I would like to have it understood that a photostatic copy may be substituted for the original.

Mr. Streissguth: That is so understood.

The Court: Received.

Q. Showing you first what has been marked Plaintiff's Exhibit A-1, I will ask you whether that is a check from the Chase Investment Company received by you in connection with this Chase stock transaction. When I say you, I mean by the First National Bank.

A. I can't tell you definitely whether this check is in payment of that particular collection, but it bears our department stamp.

Q. Is that the amount that was paid to you at the time?

A. Yes, sir.

Q. That is not one of your records, however, Exhibit A-1?

A. This check went through our department, yes, sir. That is our identification stamp.

Q. But the check itself was returned as a cancelled check?

A. Yes, sir.

Q. To the Chase Investment Company?

A. That is right.

[fol. 202] Q. But you say the cancellation stamp is the collection——

A. Not the cancellation, but this "City Collection August 23, No. 45," that is our department's identification stamp to show it went through our department.

Q. That is the rubber stamp that is on the face of the check?

A. That is right.

Q. And the "Paid" perforation stamp?

A. That is the cancellation stamp of our bookkeeping department.

Q. Have you brought with you records of the bank which I have here in my hand, including first, Plaintiff's Exhibit A-2? Is that one of the records of your bank?

A. Yes, sir.

Q. What is Exhibit A-2?

A. That is a complete record of the collection which we received from the Chase Securities Corporation, 137 South La Salle Street, Chicago, and contains certificate No. 53870 for one share Chase National Bank of the City of New York.

Q. Is that a record showing what that $1,828 was used for?

A. Yes, sir.

Q. And to whom it was transmitted?

A. That is right.

Q. Showing you Plaintiff's Exhibit A-3, a check dated August 23, 1929, or a draft—what is that, a cashier's check? [fol. 203] A. That is a Chicago draft, draft on the First National Bank, Chicago.

Q. Is that now a record of your bank?

A. Yes, sir.

Q. Is that a draft in remittance on this transaction?

A. I can't tell you definitely, but to my best knowledge and belief it is in payment of this particular collection.

Q. Then, what is Exhibit A-4?

A. That is the record of our draft cage, or draft department, showing that this draft was purchased by the City Collection Department, Chase Securities Corporation.

Q. It is a draft register, is it not?

A. Yes, that is right, draft register.

Q. Showing what drafts were issued and to whom they were issued on August 23, 1929?

A. That is right.

Q. Among them, a draft to the Chase Securities Corporation?

A. Yes, sir.

Q. The difference between $1,826.15, the amount of this draft, and $1,828 is $1.85?

A. That represents our exchange in the collection charge deducted in remitting to the Chase Securities Corporation.

Q. On an $1,828 collection?

A. Yes, sir.

Q. Does that deduction show on Exhibit A-2?

A. Yes, sir.

Mr. Streissguth: We now offer in evidence Exhibit A-1, [fol. 204] check from the Chase Investment Company to the First National Bank, dated August 20, 1929; Exhibit A-2, the record of the bank showing the receipt of a draft and the receipt of certificates of stock which correspond to those in evidence here; Exhibit A-3, the draft to the Chase Securities Corporation, dated August 23, 1929; and Exhibit A-4, the draft register which under date of August 23, 1929, shows a remittance to the Chase Securities Corporation; and we ask leave to substitute photostatic copies during the trial.

Mr. Palmer: We have no objections to the exhibits, and of course I have no objection to the substitution of photostatic copies.

The Court: Received.

Q. Then, having refreshed your recollection, I will ask you whether or not your bank did receive these certificates of stock.

A. Yes, we did.

Q. And whether you received payment from the drawee, or from Ruth Chase Donaldson, or someone in her behalf?

A. Yes, we did.

Q. And whether you remitted the proceeds to the Chase Securities Corporation in Chicago.

A. Yes, we did.

Q. And delivered the stock to the purchaser?

A. That is right.

Q. Was that all done in the City of Minneapolis?

A. Yes, sir.

[fol. 205] Q. At the banking offices of the First National Bank?

A. Yes, sir.

(No cross examination.)

RUTH CHASE DONALDSON, re-called on her own behalf, for further cross-examination, testified:

By Mr. Palmer:

Q. Calling your attention to Defendant's Exhibit 3, which purports to consist of a series of six dividend checks issued to you, I will ask you to look over this exhibit and tell us if your endorsement appears upon the back.

A. Yes.

Mr. Palmer: We offer in evidence Defendant's Exhibit 3, consisting of the six dividend checks which have been mentioned in the identification.

Mr. Streissguth: We have no objection.

The Court: Received.

Q. Defendant's Exhibit 3 consists of six separate dividend checks; the first consisting of a check dated January 2, 1931, in the sum of $9; the second consisting of a check dated April 1, 1931, also in the sum of $9; the third consisting of a check dated July 31, 1931, in the sum of $9; the next dated October 1, 1931, in the sum of $9; the next January 2, 1932, in the sum of $9; and the next April 1, 1932, in the sum of $6.75. Defendant's Exhibit 4 purports to consist of six separate dividend checks, the first one being [fol. 206] dated July 1, 1932, the second one October 1, 1932, the third January 1, 1933, the fourth April 1, 1933, the fifth July 1, 1933, and the sixth October 1, 1933. Now, calling your attention to Defendant's Exhibit 4, I will ask you if your signature appears endorsed upon those dividend checks.

A. Yes.

Mr. Streissguth: Are they all your personal signatures?

The Witness: Yes.

Q. You received and cashed, according to the testimony —

Mr. Streissguth: You can offer them and we will have no objection.

Q. —dividend check issued July 1, 1932, in the sum of $4.50; October 1, 1932, also in the sum of $4.50; dividend check January 1, 1933, in the sum of $4.50; dividend check April 1, 1933, in the sum of $4.50; July 1, 1933, in the sum

of $3.15; and October 1, 1933, in the sum of $2.99, did you not?

A. Yes.

Mr. Palmer: We offer in evidence Defendant's Exhibit 4.

Mr. Streissguth: No objection.

The Court: Received.

Q. I show you, Mrs. Donaldson, Defendant's Exhibit 5, which purports to consist of seven separate dividend checks, all of which were purportedly issued to you. Now, will you take this Defendant's Exhibit 5 and tell us whether your signature is endorsed on each separate check?

A. One of these checks is not signed by me.

[fol. 207] Q. Would you tell us by date which one it is?

A. August 1, 1936.

Q. You say that check has not been endorsed by you?

A. No. It is marked "Deposit only to the account of Ruth Chase Donaldson," and signed by Mr. Donaldson.

Q. Are you familiar with Mr. Donaldson's signature, your husband?

A. I am.

Q. Is that his signature?

A. That is his signature.

Q. Was he authorized to endorse this check for your deposit in the fashion in which the signature appears upon that dividend check?

A. Yes.

Mr. Streissguth: We will further admit that it was deposited to her credit, and that she received it.

The Witness: Yes, I received it, it says here.

Q. As to the remaining checks, except the one which was endorsed, for deposit by Mr. Donaldson, are they all endorsed, or bear your signature of endorsement?

A. They do.

Mr. Streissguth: It will be admitted that she received them.

Mr. Palmer: And that she cashed them?

The Witness: Yes.

Mr. Streissguth: And there will be no objection.

Mr. Palmer: We offer in evidence Defendant's Exhibit [fol. 208] 5, which consists of seven separate dividend checks.

The Court: Received.

Mr. Palmer: The first one being dated January 1, 1934, in the sum of $2.99; the second being dated April 1, 1934, in the sum of $3.15; the third being dated August 1, 1934, in the sum of $4.23; the fifth being dated February 1, 1935, in the sum of $6.30; the next being dated August 1, 1935, in the sum of $6.30; the next being dated February 1, 1936, in the sum of $6.30; and the last being dated August 1, 1936, in the sum of $6.30.

Mr. Palmer: If the court please, my records are apparently incomplete as to the dividend checks. I have sent word to my correspondents in New York to send on the balance of the dividend checks. My recollection is that there are more dividend checks. May I have the privilege of recalling Mrs. Donaldson for the purpose of identifying further dividend checks if our records so show any?

The Court: Yes. There is no objection to that, is there?

Mr. Streissguth: None whatsoever. We will stipulate, John, when they do come. If we stipulate, there will be no need of her being here, I assume, if you finish with the rest of your cross-examination.

Q. Now, Mrs. Donaldson, according to my notes of your testimony you testified on direct examination that the reason you would not have purchased the Chase stock if you had known it was not registered, was that it was the duty [fol. 209] of the Commission to look into stocks and to register only reliable stocks. Do you recall your testimony in that respect?

A. Yes.

Q. Is that substantially what you said?

A. I think it is, substantially.

Q. In other words, Mrs. Donaldson, before you bought the Chase stock you wanted the Commission to scrutinize its character and look into its reliability?

A. I would have supposed that the Securities Corporation would have taken care of anything like that.

Q. My question isn't that.

A. I don't quite understand you, I don't believe.

Q. My point is, and my question is, the reason why you placed importance upon the registration of the stock was that you wanted the security which you bought to be scrutinized, looked over by the Commissioner and pass on its character and responsibility before you bought it?

A. Well, I didn't ask for any such looking over. I supposed—I guess I am all mixed up. I can't quite understand what you mean, I mean what you are trying to ask me.

Q. The reason that you placed some importance upon the matter of registration of the stock is that you expected the Commission, or you hoped that the Commission would scrutinize the stock, look into it and put its stamp of approval on it, pass on it as a stock of character and reliability?

[fol. 210] A. I imagined it was a stock of character and responsibility, that the Chase Corporation would have met any legal requirements that the state demanded, and it would have been taken care of by them.

Q. Then, so far as any scrutiny by the Commissioner of Securities——

A. Well, that is what I can't get at. Do they look over every piece of stock?

Q. Well, I don't know what they do.

Mr. Streissguth: I take exception to counsel's remarks that he doesn't know what the Securities Commission does. I don't believe that is fair.

Q. My point is this—possibly I don't understand it very well myself—but the reason why you wanted registered stock, why you placed importance on that, was that you expected the Commissioner to somehow look into the character and reliability of the stock?

A. I expected the Commission to look into the character of any stock that was sold in the state of Minnesota.

Q. Whether it was registered or not?

A. No. Well, yes, whether it was registered or not, but I thought they would register only stocks that were of a reliable character.

Q. With respect to the licensing of Mr. Weir Jepson, did you place any importance upon the matter of his being licensed or not as an agent for sales in Minnesota?

A. I should not liked to have bought stock from anybody whom I considered was not a legal representative of the [fol. 211] person that he was selling stock for.

Q. If you were satisfied, however, that Mr. Jepson was connected with the Chase Securities Corporation, was its salesman, and if you were satisfied that he was licensed by the Iowa Commission, that would satisfy your requirements, would it not?

A. I would have supposed that he would not do anything that wouldn't be absolutely legal in the state of Minnesota. I would also suppose that the Chase Securities Corporation would not have allowed anything of that sort to take place.

Q. They undoubtedly wouldn't if they had known it.

A. No.

Mr. Streissguth: I move the statement of counsel be stricken as voluntary.

Mr. Palmer: I withdraw it.

The Court: It may be stricken, although it isn't evidence.

Q. You placed some importance upon Mr. Jepson's being licensed because you felt that the Commission should place some stamp of approval on his character and reliability as an agent or salesman; didn't you feel that way? Isn't that the reason you placed any importance upon it?

Mr. Streissguth: Objected to as assuming a fact not in evidence and as argumentative. She said she didn't know whether he was licensed or not.

The Court: Objection sustained.

Q. Mr. Jepson was an old friend of yours and the family, [fol. 212] wasn't he?

Mr. Streissguth: Objected to as repetition.

Mr. Palmer: This is leading up to something else, your Honor.

Mr. Streissguth: All right.

Q. You didn't need the stamp of approval of the Commissioner of Securities of Minnesota upon his character and reliability, did you?

Mr. Streissguth: I object to that, your Honor, on the ground that a sale by an unlicensed agent is illegal irrespective of the knowledge on the part of the purchaser of his being licensed or not licensed. The very fact that he is not licensed renders the sale illegal and void, therefore this question is on an immaterial matter, and does not establish a defense.

The Court: I will let her answer the question.

A. I knew him personally.

Q. And you knew that he was a reliable and responsible man, didn't you?

A. As far as I knew, yes.

Q. Now, you have qualified your answer, as far as you knew. You had known him for about eight years, hadn't you?

Mr. Streissguth: Objected to as repetition and argumentative.

The Court: Objection sustained. She said six or seven years, I think, prior to this transaction.

Q. I am sorry. I will put the question this way. You had known him for some time, six to seven years before this transaction?

Mr. Streissguth: Objected to as repetition.

[fol. 213] The Court: She may answer it again.

Q. And during that period of time you had seen nothing, observed nothing about him which would lead you in any way to mistrust him?

A. I hadn't, that is right.

Q. Do you know where Mr. Jepson lives now?

A. Yes, I do.

Q. Would you tell us where he lives?

A. He lives in Bethlehem, Pennsylvania, I believe.

Q. According to my notes you testified that your dealings were entirely with Mr. Jepson; is that your recollection of your testimony?

A. Yes, sir.

Q. You have also testified that you never knew Mr. Devine, and that you never had any dealings with regard to this Chase stock with him?

A. Yes, sir.

Q. Is that your recollection of your testimony?

A. Yes, sir.

Q. Now, have you ever told anyone that Mr. Devine solicited you to buy this Chase stock?

A. I never have.

Q. Are you quite certain about that, Mrs. Donaldson?

A. Why, yes, I am.

Q. Are you positive about that?

Mr. Streissguth: Objected to as argumentative and not proper cross-examination. She has answered it twice.

The Court: She said she never had. That is sufficient.

[fol. 214] Q. Didn't you say on about December 21, 1937, that at the city of Minneapolis, Minnesota, on or about the time alleged in the complaint herein, the said defendant, through its district manager, O. C. Devine, and his assistants, solicited the affiant to make the purchase of capital stock of the Chase National Bank and Chase Securities Corporation as alleged in the complaint herein? Now, didn't you say that on December 21, 1937, in an affidavit made by you in opposition to a motion to quash service in this action?

A. I don't know. I don't remember. Exactly what does that mean? That this man came out and solicited me for business?

Q. Well, you heard me read the statement.

A. Well, that is what it seemed to me it meant. No one ever did come out, as far as I know.

Q. Do you want me to read it again?

A. Well——

Q. Do you understand it?

A. No.

(Question read as above: "Didn't you say on or about December 21, 1937, that at the city of Minneapolis, Minnesota," and so forth:)

A. If that means that anyone solicited me to buy stock in December, 1937, no one did that I remember.

The Court: The question was whether you made that statement in the affidavit, was all.

Mr. Streissguth: We will admit that that statement is contained in an affidavit made by her in this case.

[fol. 215] Mr. Palmer: If the court please, I move that the answer of the witness be stricken as not responsive.

The Court: It may be stricken.

Q. Now, the question, is, Mrs. Donaldson, did you make that statement in an affidavit about the time which has been asked you, on December 21, 1937?

A. I don't remember.

Mr. Palmer: If the court please, I do not find the original affidavit in the file. If it is not in this file, it has either been removed, or counsel for plaintiff has not filed it, because an affidavit was served on me. I would like to have Mr. Streissguth look through his file.

Mr. Streissguth: I have got a copy of it. I would be glad to have you use it, and I will admit that she signed it.

The Court: The register would show whether it was filed.

Mr. Streissguth: I am not responsible for the original. You don't mean that I removed it, Mr. Palmer?

Mr. Palmer: I didn't say that.

Mr. Streissguth: You didn't mean that, did you?

Mr. Palmer: No, I should say not.

(A short recess.)

Q. Now, Mrs. Donaldson, calling your attention to an affidavit purportedly signed by you, I will ask you to refer to the last paragraph, commencing at the bottom of page one of said affidavit, and ending at the first sentence on [fol. 216] the top of page two, and ask you to see if that paragraph refreshes your recollection as to whether or not you made that statement.

Mr. Streissguth: You may read the whole affidavit.

A. Do you want me to say whether I signed this?

Q. No, I am asking you if the reading of that affidavit and the portion I have just referred to refreshes your recollection, and I ask you if after reading it you are able to say whether you now recall having made such a statement.

A. Yes, I signed this. This thing was prepared by Mr. Streissguth and I signed it.

Mr. Palmer: If the court please, I move that the answer be stricken as not responsive.

Mr. Streissguth: What do you mean by making a statement? Do you mean making an oral statement or written statement?

The Court: That part may be stricken.

(Question read as follows: "No, I am asking you if the reading of that affidavit and the portion I have just referred to refreshes your recollection, and I ask you if after reading it you are able to say whether you now recall having made such a statement.")

A. Again, I say it was prepared by my attorney, what I had said, and I signed it. I gave him the information and he made out this statement. I didn't make it.

The Court: What do you have in mind by a statement? An oral statement?

[fol. 217] Q. Did you make a statement in writing which I have referred to in the form of an affidavit?

Mr. Streissguth: She admits, and we admit that she did.

A. It was written by Mr. Streissguth, this thing that I signed.

The Court: Whether she signed that statement?

Mr. Palmer: That is it.

Mr. Streissguth: Did you sign that statement?

The Witness: I signed it, yes. That is what I have been saying over and over again.

Q. I will rephrase the question, then. Did you sign an affidavit, which contains the statement which we have been referring to in your previous examination?

A. What statement is that?

Mr. Streissguth: Did you sign that affidavit which you have in your hand?

The Witness: Yes, I did. I signed this.

Mr. Palmer: Possibly I better reframe the question again.

Q. Did you sign an affidavit on or about December 24, 1937, containing the statement that at the city of Minneapolis, Minnesota, on or about the time alleged in the complaint herein——

The Court: Just a minute. I think she better follow it on there, if that is the affidavit.

The Witness: Yes, I understand it now.

Mr. Streissguth: Just follow it in that affidavit.

Q. It is at the bottom of page one, continuing over to the middle of the first sentence on page two. Now I will [fol. 218] read the statement. "That at the city of Minneapolis, Minnesota, on or about the time alleged in the complaint herein, the said defendant through its district manager, O. C. Devine, and his assistants, solicited the affiant to make the purchase of capital stock of the Chase National Bank and Chase Securities Corporation as alleged in the complaint herein."

A. Yes, I signed that.

Q. You signed an affidavit containing that statement?

A. That is right.

Q. Before you signed that affidavit, did you read it over?

A. Yes, I expect I did.

Q. You say you expect you did. Don't you recall whether or not you did in fact read it over?

A. Yes; I read it over.

Q. You signed that affidavit in front of your attorney, did you not?

A. Yes; Mr. Streissguth.

Q. And you subscribed to the affidavit, and you were asked, were you not, whether it was true and correct?

A. Yes.

Q. You told whoever you signed that before, your counsel here, that it was true and correct, didn't you?

A. Yes.

Q. Weren't you also told that that affidavit was going to be used and read upon a motion to quash service in this action?

[fol. 219] Mr. Streissguth: That is objected to as a privileged communication with her attorney.

The Court: I will sustain that objection.

Q. Didn't you also sign this affidavit containing the statement, "Further affiant sayeth not except that this affidavit is made in opposition to the motion of the defendant to set aside the service of summons herein"?

Mr. Streissguth: That is objected to as not the best evidence. We have admitted that she signed the affidavit. I don't know why counsel doesn't offer the affidavit. We will, if you don't. You might as well offer it now. I don't know why he is avoiding the offering of the affidavit.

The Court: She may answer the question.

Mr. Streissguth: Let her see it.

A. Is this the same thing? I signed it.

(Last question read.)

Q. I refer you to the last paragraph of the affidavit.

A. It says that there, yes.

Q. And you signed the affidavit containing that statement?

A. I signed it.

Mr. Palmer: Defendant offers in evidence the following statement from Defendant's Exhibit 6: "That at the city of Minneapolis, Minnesota, on or about the time alleged in the complaint herein, the said defendant, through its district manager, O. C. Devine, and his assistants, solicited the affiant to make the purchase of the capital stock of the

Chase National Bank and Chase Securities Corporation [fol. 220] as alleged in the complaint herein." This statement is contained in the paragraph commencing at the bottom of page one and ending in the first sentence on the top of page two.

Defendant also offers in evidence the statement contained in Defendant's Exhibit 6, as follows: "Further affiant sayeth not, except that this affidavit is made in opposition to the motion of the defendant to set aside the service of summons herein." The defendant also offers in evidence the acknowledgment appearing upon this affidavit, purportedly made by T. O. Streissguth.

Mr. Streissguth: We will object to the partial offer on the ground it is not complete, and that it only seeks to set forth part of the witness' statement. That is our first ground. On the second ground that it does not tend to impeach the testimony of this witness, there being nothing inconsistent in the affidavit and the testimony which she has given on the trial. I call the court's particular attention to her statement, "That at the city of Minneapolis the defendant through its district manager, O. C. Devine, and his assistants," solicited the affiant to make the purchase. There is no impeachment; there is no inconsistency, and it is only part of the affidavit that is being offered.

The Court: I will receive that portion. You may offer the balance if you care to.

Q. Now, according to my notes, Mrs. Donaldson, you testified that Mr. Jepson told you that the Chase stock had the same value as National City, which was selling at about [fol. 221] twice the money, that the stock would appreciate in value and it would be a good buy; do you recall that testimony?

A. I think I said the same face value, didn't I?

Q. We will check it. According to the notes of the reporter on page three of the transcript of the testimony of Ruth Chase Donaldson, the third page after she starts in her testimony on direct examination, I find the following question and answer:

"Q. Will you tell the court, and speak loud enough so the judge can hear you, just what the conversation was with Mr. Jepson in respect to purchasing these units?

A. (I am skipping the colloquy between the court and counsel) Mr. Jepson came out to our house and he told me

that the Chase National Bank was the biggest bank in the United States, that it had the tremendous funds both known and unknown to the public; that it had a book value, the same value as National City Bank Company, which was selling at perhaps twice as much money and that the stock should appreciate in value and that it would be a very good buy. Under those circumstances, I told him that I gave him the order to buy me some stock, you know, from the—at the market price." Do you recall that testimony?

A. I do.

Q. At that time in 1929, about the time you were solicited for this Chase stock, your brother, Chauncey Chase, was working as a salesman for the National City Company, was he not?

A. Yes, he was.

Q. And he was working out of the Denver, Colorado, [fol. 222] office at that time, wasn't he?

A. He probably was. He worked out there, anyway. I don't remember just exactly when he did go out there.

Q. Did you carry on correspondence with your brother out there?

A. Very little, if any.

Q. Did you carry on any at all?

A. I can't remember carrying on any at all.

Q. After Mr. Jepson made these statements which you have testified about on direct examination didn't you post a letter to your brother Chauncey and ask him about National City stock and about this matter of book value?

A. No.

Q. You did not?

A. No.

Q. Did you make any inquiry?

A. No.

Q. Of your brother Chauncey?

A. No.

Q. About this Chase Bank stock?

A. No.

Q. At or about the time you bought this Chase Bank stock did you buy any National City stock?

A. No.

Q. Did your husband buy any National City stock?

Mr. Streissguth: Objected to as immaterial. Withdraw the objection.

A. You would have to ask him. I don't know. I don't think so, but I don't know.

[fol. 223] Q. Do you know whether or not your brother sold your husband any stock?

A. I don't believe he did, but I don't know.

Q. Did you hear your husband discuss the matter of buying National City stock at any time?

A. No.

Q. Didn't your brother Chauncey Chase enter the employ of the National City Company at the St. Paul office in about 1921?

Mr. Streissguth: Objected to as immaterial.

The Court: Is that a preliminary question?

Mr. Palmer: It is just part of the same inquiry about her brother's business connections.

Mr. Streissguth: She said she never discussed National City with her brother. Now, what materiality could it possibly have?

The Court: I will let her answer the question if you think it is material.

A. I think so. It was shortly after the war, anyway.

Q. Was he in the employ of the National City from that time, shortly after the war, right down to the time of this Chase transaction in 1929?

A. Yes, he was. I believe he was.

Q. Now, Mrs. Donaldson, you have had some business experience, haven't you?

A. Very little.

Q. Your husband's corporation is the Donaldson Company, Incorporated, and it is located in the Midway in St. Paul?

A. Yes, sir.

[fol. 224] Q. Aren't you an officer and a director of that corporation?

A. Yes, sir.

Q. You hold the office of assistant secretary, don't you?

A. Yes.

Q. It is part of your duties as assistant secretary to act in the place of the secretary if he is absent, or for some reason unable to act as secretary?

A. I have never been asked to do anything.

Q. But you are ready to act if you are asked?

A. But that is also a closed corporation, and we run it the way we think it should be.

Mr. Palmer: I move that the answer be stricken as not responsive.

The Court: The later part may be stricken.

Mr. Streissguth: In reference to how they run it.

Q. Your husband's corporation, of which you are a director and the assistant secretary, was organized under the laws of the state of Delaware about 1936, wasn't it?

A. To the best of my recollection, I think that is true.

Q. The predecessor company of the Delaware corporation was a Minnesota corporation of the same name, wasn't it?

A. I thought they changed the name a little. I don't know, I am sure.

Q. Except for a minor change in the name, your husband's corporation prior to 1936 was a Minnesota corpora-
[fol. 225] tion, wasn't it?

Mr. Streissguth: If she knows.

A. I don't know. I think it was, but I don't know. I really don't know.

Q. Do you draw a salary as the assistant secretary of your husband's corporation?

A. Yes.

Q. What salary do you draw?

Mr. Streissguth: Objected to as immaterial, not bearing upon any of the issues.

The Court: Objection sustained.

Q. As assistant secretary of the Donaldson Company are you familiar with the fact that the corporation was capitalized at one million dollars in 1936?

Mr. Streissguth: Objected to as immaterial.

The Court: Will you state to the court just how this is material? Are you trying to enlarge upon or show her business ability?

Mr. Palmer: Yes, your Honor, I am going into her business experience, business background, her connection with the corporation, which certainly upon the records appears to be one of considerable size and responsibility.

The Witness: Don't you think that should be far back before 1928 or 1929, then?

Mr. Palmer: That is also material on the question here of her diligence in discovery of this alleged fraud, her discovery of the facts and circumstances which she claims she was ignorant of durng the period of almost ten years. Furthermore, it bears upon the issue of laches, whether [fol. 226] she was a person of business experience, intelligence, and background, connected with financial matters, has been diligent in discovering and prosecuting her rights.

Mr. Streissguth: Well, your Honor, the question now is the size of the husband's corporation. Assuming that everything counsel states is true, are they defenses? I take an opposite stand. This question certainly is absolutely immaterial. Laches, ratification and estoppel are absolutely no defense to a sale which is void ab initio such as this sale. Whether that sale was induced with or without fraud is immaterial. The sale itself being in violation of the statute is absolutely void and cannot be ratified.

The Court: I suppose that is one of the matters we will take up later. I don't see how this question could be material, as to the capital stock.

Mr. Palmer: I think it bears upon the general background and type of business which she is connected with.

The Court: I will permit you to go into her business experience, just how active she is with the corporation. I will sustain the objection to that question.

Q. You have said that you do draw a salary as an officer of the company. What are your duties, and what do you do to earn your salary?

Mr. Streissguth: What time are you referring to?

The Court: I suppose that should be prior to August, 1929.

[fol. 227] Mr. Palmer: Your Honor, I am inquiring as to her connection with the Delaware corporation of which she is an officer and in which she became an officer in 1936.

Mr. Streissguth: Objected to as incompetent, irrelevant, immaterial, and not bearing upon the issues.

Objection overruled.

A. I attend the directors' meetings.

Q. Do you do anything else besides attend the directors' meetings?

A. No.

Q. Do you take part in the deliberations at the directors' meetings?

A. I don't think that my opinion is given a great deal of weight, no.

Q. But you do express your opinion from time to time, don't you?

A. Not about the policy of the company or anything of that sort, no.

Q. Well, what do you express your opinion about?

A. I don't think I do about anything. I just go. I have the right to vote, that is all.

Q. Do you exercise your right to vote?

A. At the directors' meetings, yes, if they take a vote.

Q. Do you own any of the capital stock of the Delaware corporation?

Mr. Streissguth: Objected to as immaterial.

The Court: Oh, she may answer.

A. Yes.

[fol. 228] Q. Do you receive any compensation as a director for attendance at directors' meetings?

Mr. Streissguth: Objected to as immaterial.

Objection sustained.

Q. How many shares of stock in the Delaware Company do you own?

Mr. Streissguth: Objected to as immaterial.

The Court: Objection sustained. I don't see the materiality of that.

Q. You do own some shares of stock in the company, don't you?

A. I said so.

Q. Have you received dividends on those shares?

Mr. Streissguth: Objected to as immaterial. The stock of the Donaldson Company?

Mr. Palmer: That is right.

Mr. Streissguth: Objected to as immaterial.

Objection sustained.

Q. Your husband is the president of the Delaware company, isn't he?

A. He is president of the Donaldson Company. I guess so.

Q. And he was president of the Donaldson Company in 1929, wasn't he?

A. Yes.

Q. Were you an officer of the company in 1929?

A. No.

Q. Were you on the board of directors at that time?

A. No.

[fol. 229] Q. Were you a stockholder in the company at that time?

A. No.

Q. When was it that you first became a stockholder in the Donaldson Company?

Mr. Streissguth: Objected to as immaterial.

Objection overruled.

A. I am not sure about this. I think it was when they changed the thing around in the first of 1936, but I am not sure about that. It may have been a year before that, or something like that. About 1935 or 1936.

Q. After you became a stockholder in the company did you attend the stockholders' meetings?

Mr. Streissguth: Objected to as immaterial.

The Court: You may answer.

A. They have an annual meeting every year. I think I have been to one, maybe two. I am not sure. One, I know.

Q. Are you referring to the stockholders' meetings?

A. The stockholders and the officers are just the same, I think. I don't know which it was. I don't know whether it was a stockholders' meeting or an officers' meeting. I am not up right on that. Is Mr. Olin an officer in that company? I don't believe he has any stock. His wife has.

Q. Have you any interest in the Johnstone-Charlstrom Company, Incorporated?

A. Yes.

Q. That is a Minnesota corporation, isn't it?

A. Yes.

[fol. 230] Q. Were you one of the incorporators in this company?

A. I am what is known as a silent member, I believe. I helped finance it. I gave them some money. I helped them finance with some money.

Q. You invested some money in that company?

A. Yes, that is right.

Q. And in exchange for the money you invested you got shares of stock?

A. Yes, that is right.

Q. Are you also an officer of that company?

A. I don't know. I think I am supposed to be vice-president or something. I am not active in it.

Q. Do you draw any salary as an officer of the company?

A. No.

Q. Are you on the board of directors of the company?

A. I don't know. It has only been in existence two or three months, so I don't know.

Q. How many shares of stock do you own in the Johnstone-Chalstrom Company?

Mr. Streissguth: Objected to as immaterial.

The Court: Objection sustained.

Mr. Streissguth: I at this time move also that any reference to her ownership of stock in the Johnstone-Chalstrom Company, which was organized only a few months ago, be stricken as absolutely immaterial, too remote and not having any bearing upon any issue in this case.

Mr. Palmer: It all bears upon the plaintiff's general business experience, background.

[fol. 231] The Court: I suppose it is all subsequent to the beginning of this action, though.

Mr. Streissguth: This was all subsequent.

Mr. Palmer: It was subsequent to this action, your Honor. It bears also upon the issue of laches and the issue of her discovery. It shows her general background, the character of this plaintiff, her interest and——

The Court: I will let it stand if it is of any importance. I don't see it at this time.

Q. This Johnstone-Chalstrom Company is engaged in what business?

A. They sell ladies' clothing, dresses and coats.

Mr. Streissguth: A dress shop?

The Witness: A dress shop.

Q. Where is it located?

A. On 9th Street. I think it is number 15.

Q. In addition to the business of selling ladies' ready-to-wear does the company buy or sell any securities, stocks, bonds, mortgages, securities of any other type?

A. No, not at the dress shop. It is a very small affair.

Q. Your company is authorized by its articles to buy and sell securities and to acquire and dispose of them, isn't it?

A. I don't know.

Mr. Streissguth: You are referring now to the company that was organized in 1938 or 1939 after the commencement of this action? He is reading from the articles. Object to it as too remote, subsequent to the commencement [fol. 232] of the action and not material.

The Court: Objection sustained.

Q. Do you know how many stockholders there are in this company?

Mr. Streissguth: Same objection.

The Court: Same ruling. Objection sustained.

Q. Has there been any offer of the stock of the Johnstone-Chalstrom Company to the public for sale?

Same objection and ruling.

Q. Do you know whether the stock of the Johnstone-Chalstrom, Incorporated, has ever been registered in the office of the Commissioner of Securities?

Mr. Streissguth: Objected to on the same grounds.

Objection sustained.

Q. Do you have any interest in the Chase Investment Company?

A. Yes, I suppose so. Yes, I do.

Q. What is the nature of that interest?

Mr. Streissguth: Do you refer to the time?

Mr. Palmer: We will bring that out, Mr. Streissguth.

Mr. Streissguth: In 1929 it was not incorporated. I understand it is incorporated now, so you should specify.

Mr. Palmer: Just a minute.

Mr. Streissguth: The question is indefinite as to which company he refers to, the old one, or the incorporation. I ask that you make the question definite.

[fol. 233] Mr. Palmer: I intend to follow my question, tying up the period of time I am inquiring about.

Mr. Streissguth: Please do so in your question. I object to it as indefinite.

Mr. Palmer: The witness can tell us.

The Court: I will let her answer the question.

A. Did you ask me if I have any stock in the Chase Investment, Incorporated, is that the question?

Q. That is not the question.

(Question read as follows: "What is the nature of that interest?")

A. Well, that is kind of a long story. My father started the Chase Investment Company.

(Recess until 2 P. M.)

May 10, 1939, 2 o'clock P. M.

Mrs. Ruth Chase Donaldson resumed the witness stand and testified as follows:

Cross-examination (continued).

By Mr. Palmer:

Mr. Palmer: If the court please, if I may be permitted to digress a moment, it has been called to my attention that Defendant's Exhibit 3 was not offered in evidence this morning.

The Court: My record shows that it was offered and received.

Mr. Streissguth: We have no objection.

Mr. Palmer: Mr. Ward called my attention to the fact that his transcript did not show.

[fol. 234] The Court: It may be understood then that it is in evidence.

Mr. Palmer: Defendant then offers in evidence Defendant's Exhibit 3 identified as six separate dividend checks.

Mr. Streissguth: No objection.

Mr. Palmer: The first being dated January 2, 1931, issued to the plaintiff in the sum of $9.00; the second being dated April 1, 1931, issued to the plaintiff in the sum of $9.00 also; the third being dated July 1, 1931, issued to the plaintiff and in the sum of $9.00; the fourth being dated October 1, 1931,

issued to the plaintiff and in the sum of $9.00; the fifth being dated January 2, 1932, issued to the plaintiff and in the sum of $9.00; the sixth being dated April 1, 1932, issued to the plaintiff and in the sum of $6.75.

Q. You received and cashed those dividend checks, did you not, Mrs. Donaldson?

A. I did.

Mr. Palmer: We offer in evidence Defendant's Exhibit 3.

The Court: Received.

Q. When we left off this morning we were talking about the Chase Investment Company. Will you state whether that company was a partnership or a company solely owned by your father in 1929, and operated by him?

A. Solely owned by him?

Q. Solely owned by him and operated by him in 1929?

A. Well, it was a holding company in which I had owned [fol. 235] some separate pieces of property which they collected the rent on, and credited it to my account.

Q. Do you know whether the nature of the business organization was that of a partnership?

A. I don't know.

Q. Who was the manager of the business at that time?

A. I don't know that. I don't know whether my father was or whether one of my brothers was at that time.

Q. Were your brothers connected with the business at that time?

A. Well, I think two of them were, Charlie and Elbridge. Of course Kenneth wasn't, I don't believe, nor Chauncey.

Q. What was the nature of the business that was conducted by the Chase Investment Company at that time? Did they buy and sell securities?

A. Well, no, not to the public or anything of that sort. They might have bought if I had a little money saved up, they might buy me a bond, if I had enough money to buy one.

Q. Now, at that time did you have your funds invested with the Chase Investment Company?

A. Well, I couldn't say they were invested with them because, as I said, it was just a holding company in which I had a few pieces, individual pieces of property which they took care of and returned what income there was from them to me.

Q. Did they handle all of your business affairs for you [fol. 236] and your properties for you?

A. Yes.

Q. Did they handle your investments, including such investment matters as pertained to stocks and bonds for you?

A. Up to the time that I bought this stock I don't think that I, individually, ever bought anything without their—without buying it through them and with their consent.

Q. Did your husband contribute in any way to the funds or properties which were being handled by the Chase Investment Company for you?

A. No.

Q. Then the Chase Investment Company just handled your separate property and your separate funds?

A. Yes.

Q. Is that right?

A. Yes.

Q. At that time in 1929 and prior to this transaction in which you bought Chase stock, did your husband handle any of your investments for you?

A. No, I don't believe he ever did.

Q. Did you generally consult your father or the brothers that were then associated in the Chase Investment Company before you invested in securities of any kind?

A. This is the first time I ever bought anything. I mean by that if I had enough money to buy a bond they might call me and say that I had enough money to buy a bond and [fol. 237] suggest that they buy the bond for me, but that is the first time I ever independently bought anything.

Q. In other words, with the exception of this transaction where you purchased Chase stock, you invested discretion in the Chase Investment Company in the matter of buying and selling securities and handling your property for you.

Mr. Streissguth: What do you mean by securities?

A. That is what I say, I didn't have any securities except some bonds.

Q. Then I will rephrase the question. With the exception of this purchase of Chase Bank stock you invested the Chase Investment Company with discretion in handling your properties?

A. To a great extent, yes; almost entirely, I think.

Q. Excuse me. I didn't quite hear that.

A. Almost entirely, I would say. As I told you before they would call me probably and tell me I had enough money

to buy a bond and advise me that such and such a bond might be a good bond to buy.

Q. Now prior to this purchase of Chase stock did the Chase Investment Company ever buy any bonds for you?

A. Yes.

Q. Do you remember how many bonds they bought for you in the year 1929 prior to this purchase of Chase stock?

A. No.

Mr. Streissguth: I have no particular objection except [fol. 238] that I think it is immaterial and prolonging the record.

The Court: She has answered the question "No." Let it stand.

Mr. Streissguth: The answer reads?

The Witness: No, I wouldn't know.

Q. Excuse me. What was the answer?

A. No, I wouldn't know. You asked me if I knew, and I said I didn't.

Q. You don't know. Do you know if they bought more than one bond for you prior to this purchase of Chase stock?

Mr. Streissguth: Objected to as immaterial.

Mr. Palmer: If the court please, I think this will bear directly on her experience in investment matters.

The Court: Overruled.

(The question is read by the reporter.)

A. You want me to answer that? I don't know.

Q. Do you know whether the Chase Investment Company, prior to this transaction, bought any mortgages for you?

A. I think perhaps they might have. I don't know.

Q. Do you know whether they bought more than one more prior to this?

A. No, I don't know.

Q. Did they ever buy for you a mortgage participation, that is, a part of a mortgage on downtown real estate in Minneapolis?

A. I don't know.

Q. Now you have been asked to produce books and rec- [fol. 239] ords, your books and records pertaining to the stocks, bonds and other types of securities which you purchased or which were purchased for you in 1929.

A. Yes, sir.

Q. I will ask you if you have any books or records relating to that period of 1929.

Mr. Streissguth: You, yourself, whether you have any?

A. Oh, I haven't any, no.

Q. Does the Chase Investment Company——

A. They keep books.

Q. —have any books or records pertaining to the investments made for you in 1929?

A. Yes, I expect they have. They keep books.

Mr. Palmer: Will you produce those books and records?

Mr. Streissguth: She says she hasn't any, Mr. Palmer. They belong to the Chase Investment Company.

Q. Now the books and records which are kept by the Chase Investment Company, you have seen those books prior to the time of this trial, have you not?

A. I have seen them, yes.

Q. Do you know who kept the books for the company in 1929?

A. No, I don't know.

Q. Do you know who now keeps the books of the company and who keeps your account in these books at the present time?

A. No, I don't know.

[fol. 240] Q. Mr. Streissguth has mentioned that the books are here in court. Now is there anyone here from the Chase Investment Company who has the books with him?

Mr. Streissguth: I will explain, Mr. Palmer, that you asked that we produce those. This lady has had nothing to do with the books. Her brothers are here in court and they have brought the books with them and I think they are willing that you use them, but as far as her knowing anything about the books or the entries, she does not. The books were made by the brothers or their bookkeeper. So that, with that understanding, you are at perfect liberty to examine the books, but I don't want this witness cross examined because she didn't have anything to do with the keeping of the books.

Mr. Palmer: If the court please, I am perfectly willing to discontinue my examination about the entries in the books if Mr. Streissguth is willing to permit me to call whoever is in charge of the books of the Chase Investment Company for cross examination under the statute.

Mr. Streissguth: No, I can't allow that. You can call him as your own witness. He is not a party to this action.

Mr. Palmer: All right, I will do my best then to inquire into the books through this witness.

Mr. Streissguth: Well, you are welcome to the books, John. The book is right there.

(The question is read by the reporter.)

Q. Will you answer the question, please? Did you hear [fol. 241] the reporter read it? Is there anyone here from the Chase Investment Company who has the books with him?

A. The book is here in court and my brothers are here, as Mr. Streissguth said.

Q. Do you know which one of your brothers is in charge of the books?

A. No, I don't know.

Q. Do you know which one of your brothers brought it into court?

A. Carried it in?

Q. Yes.

A. No I don't know that, either. I didn't see him.

Q. Have you ever examined the books yourself?

A. In regard to this matter you mean?

Q. No, I mean generally.

A. Yes, the books are always open for me to look at. I don't examine them very often, I admit that.

Q. Have you examined them recently?

A. Yesterday I went down and saw this thing where they showed the—sent this check to the bank, day before yesterday it was.

Q. About how often have you examined the books?

A. I imagine, oh I should say probably three times in my life.

Q. Now to the best of your knowledge, the entries contained in those books are true and correct particularly which pertain to your investment matters?

[fol. 242] A. They always have been, as far as I know.

Q. As far as you know the entries made for the year 1929 are true and correct, is that right?

Mr. Striessguth: Objected to as calling for a conclusion and no foundation laid. This witness shows herself disqualified.

Mr. Palmer: I think, your Honor, the foundation has been laid by the fact that she has examined them, she says, at least three times in her life.

The Court: The question was so far as you know. I suppose you can answer that?

The Witness: As far as I know what?

Q. The question has slipped my mind. Mr. Reporter, will you read it?

(The question is read by the reporter.)

A. Yes.

Mr. Palmer: Would you produce the book, Mr. Streissguth?

Mr. Streissguth: Yes, sir, I would be very glad to, Mr. Palmer. Will you promise to use it if I produce it?

Mr. Palmer: If you will waive or if you will permit me to call one of the Chase boys for cross examination——

Mr. Streissguth: I am not their attorney. You will have to call him.

Mr. Palmer: Maybe I will have to call in an auditor.

Mr. Streissguth: There you are.

Mr. Palmer: If the court please, will you excuse us a few minutes?

[fol. 243] (Discussion between counsel off the record.)

Mr. Palmer: Now, if the court please, we are prepared to stipulate in the record the matter of the inquiry on the books: As I understand, counsel for the plaintiff is willing to supply us with a photostatic copy of the entries under the name of Ruth Chase Donaldson in the books of the Chase Investment Company for the years 1926, 1927, 1928, and 1929 and that they are willing to waive any objection to foundation but preserving, however, the objection to the matter contained in this book in so far as same may be material to the issues. Is that right?

Mr. Streissguth: And with the understanding that they are offered for the purpose of showing what her investments actually were, not for the purpose of establishing her experience in making investments, which she said were made by her brothers, just for the purpose of showing what her investment were.

Mr. Palmer: What her holdings were as they appear from the books of the Chase Investment Company.

Mr. Streissguth: That is correct.

Mr. Palmer: However, your Honor, and Mr. Streissguth, I do not like to limit myself too greatly by the last stipulation, the last clause, because, as I recall her testimony, she has testified that where investments were made for her, with the exception of the purchase of the stock of the Chase Securities Corporation, she generally consulted her brothers or was called upon the matter.

[fol. 244] The Witness: On the contrary, I didn't say that. I said that they called me and told me I had enough money and then they made the investment for me; they might do that, but they did it all themselves. I didn't do it.

Q. I didn't mean to misquote you.

A. All right. You understand that I never called them and asked them to buy me anything.

Mr. Palmer: Now, if the court please, I don't want to take issue here on what the record shows. I am just trying to repeat as best as I recall, what the record shows, and I don't want to limit myself therefore too much by the last clause of this stipulation, otherwise it is perfectly all right.

Mr. Streissguth: They are offered then for the purpose of showing holdings, not for the purpose of showing the manner in which they were acquired. She has explained that and you are entitled to her testimony. The records, I understand we agree, were offered only for the purpose of showing what those holdings were from time to time.

Mr. Palmer: For the purpose of showing what those holdings were I assume she would have to produce some other record. As I understand it this book would show only what she happened to buy or sell or what some particular investment might appear to her for the time shown in the book.

Mr. Streissguth: That is right.

Mr. Palmer: Now if you are confining me to what she held at the time, then of course we are outside the book.

[fol. 245] The Court: Why not let her testimony stand for what it is worth?

Mr. Streissguth: That is what I want, and the book to show what the transactions, the income and the disbursements were during those periods in her behalf by the Chase Investment Company.

Mr. Palmer: By the Chase Investment Company?

Mr. Streissguth: That is right. All right. Now we will supply the photostats. That is all you want the book?

Mr. Palmer: That is all I want the book, I think. At least I don't think of anything else right now. If I want something else I will tell you.

Q. Did you have any brokerage accounts with any of the investment houses in Minneapolis in 1929?

A. No, sir, no.

Q. Since 1929 and up to the time of the trial of this action have you had any accounts with any of the investment companies of Minneapolis?

Mr. Streissguth: Just a minute please. Did you say after 1929?

Mr. Palmer: After 1929, the period commencing January 1, 1930, down to the time of the trial of this action.

Mr. Streissguth: Objected to as having no bearing upon the issues; immaterial.

Mr. Palmer: If the court please, I am asking this for the same reason that I explained this morning, it has some bearing upon her experience, her business experience, her [fol. 246] knowledge of this socalled fraud and laches in failing more promptly to seek redress.

The Court: Her knowledge of course cannot be retroactive. I will let her answer the question yes or no.

A. Yes, I have.

Q. Could you tell us what the names of those investment companies are where you have had accounts during that period?

Mr. Streissguth: Objected to as immaterial.

The Court: Well, if they are recent I don't think they are.

Mr. Streissguth: They are after the purchase.

The Court: They are subsequent to the lawsuit.

Mr. Streissguth: That is what he is referring to, 1930, and subsequent years.

The Court: When was this action started?

Mr. Streissguth: The action was started in 1937.

The Court: 1937?

Q. Well, I will confine my question to the period of time commencing January 1, 1930, and ending with the time of the commencement of this action in December of 1937.

Mr. Streissguth: You may answer the question. I don't have any particular objection. I just think it is immaterial.

A. I have an account with Paine Webber for a little while, for about two months, I think, once.

Q. What time was it you had that account, or the date? [fol. 247] A. I would have to look that up. I wouldn't be sure of it.

Mr. Streissguth: For how long did you say?

The Witness: I think about two months.

Q. Would you tell us the year in which you had the account there?

A. In the summer time. I am not sure, but I think it was the year after Roosevelt went in as President the first time, but I would't be sure of that without looking it up.

Q. Did you have an account with any other investment house during that period of time?

A. I don't think so, no.

Q. Would you mind looking that up?

A. Yes, I will look that up, too. I don't think so. I just had this little account and I had it not more than two months, I think.

Q. Do you remember what securities they bought and sold for your account at Paine Webber during this period?

Mr. Streissguth: Objected to as immaterial.

The Court: Oh, let her answer.

A. No, I don't remember.

Q. Would you look that up, too, for us?

A. Well, I will try to.

Q. Now when Paine Webber acted for you in buying and selling securities, didn't they invariably charge you a commission?

Mr. Streissguth: Objected to as incompetent, irrelevant and immaterial what was done in 1932.

Mr. Palmer: If the court please, I believe I can make the point of my inquiry plain. I don't like to disclose the [fol. 248] purpose of course at this time.

Mr. Streissguth: Any experience that she gained in 1932 about the paying of commissions couldn't have been any help to her in 1929 when she bought some Chase securities and that is the reason it is too remote.

The Court: I understood the purpose was something else, I will let her answer.

Mr. Palmer: Mr. Streissguth, will you step up to the bench with me, and I will try to make my purpose clear.

(Consultation of counsel with court.)

Mr. Palmer: Well, I won't press that line any further.

Q. During the conversation that you had with Mr. Jepson was your husband present?

A. Yes.

Q. Did he take part in that conversation with Mr. Jepson?

A. Yes, we were all three talking.

Q. Did you have more than one conversation with Mr. Jepson?

A. Not at that time, no.

Q. Did you at any time prior to the time that you placed the order for this stock have any further conversation with Mr. Jepson?

A. About buying the stock?

Q. Yes.

A. No.

Q. And prior to the time you placed the order you had but one conversation with him?

A. That is right.

[fol. 249] Q. That is correct, is it not? Now at the time you placed your order for eight shares your husband also placed an order for fifty shares, did he not?

A. I believe it was fifty shares. I know that he bought some. I wouldn't be able to say how much it was.

Q. Was it the same night that this conversation took place that you placed the order for the stock?

A. As I testified before, I told him that he could place an order the next day subject to the price not going up more than a quarter of a point—more than a half a point as I remember.

Q. I see. Did he call you the next day and confirm the placing of the order at the price discussed the evening before?

A. I don't remember that he did. I got a confirmation slip though and I looked at it and the price was practically—it was just the same as—I think it was identical with the day before, as I remember it.

Q. Did you get a call from the Minneapolis office of the Chase Securities Corporation relative to the price confirmation the next day?

A. I don't believe I did. I am not sure about that.

Q. Did you and your husband talk over the matter of placing an order prior before you told Mr. Jepson to order the stock?

Mr. Streissguth: Objected to as a confidential communication between husband and wife.

[fol. 250] Mr. Palmer: This is not a matter involving marital relations.

Mr. Streissguth: It doesn't have to be.

The Court: Overruled. She may answer.

A. I don't remember about that either. You mean before Weir came out? I don't think so.

Q. No, I mean this, did you and your husband leave Weir for a moment and talk over this matter about placing the order and then come back in and tell Weir that you had decided to buy Chase stock?

A. I don't remember. I don't know whether we called him up later that day and said we would do it or not.

Q. Did you call your brothers and ask them for their advice about this Chase stock before you placed your order?

A. No.

Q. Did you talk to anyone——

A. No.

Q. —outside of your husband about this matter before you placed the order?

A. No one else.

Q. Were all your business affairs in 1929 handled by the Chase Investment Company?

A. Yes, they were.

Q. At the time that you talked with Mr. Jepson, didn't he tell you that he was a salesman for the Chase Securities Corporation working out of the Sioux City office?

A. I suppose he did, yes.

Q. Did he tell you that the Chase Securities Corporation [fol. 251] was offering this stock for sale to the public?

A. Well, I knew it was handled over—on this—what is this market that they have, across the counter or whatever they call it. I know you could buy it or sell it, I guess, if you wanted to.

Q. I don't believe that quite answers my question, Mrs. Donaldson.

Mr. Palmer: Mr. Reporter, will you read the question again?

Mr. Streissguth: I think the answer is responsive.

Mr. Palmer: I shall move to strike the answer out as not responsive to the question.

Mr. Streissguth: I insist it is responsive.

(The question and answer are read by the reporter.)

Mr. Palmer: If the court please, perhaps I could solve this impasse by asking this further question, if the court will permit me to.

The Court: Go ahead.

Q. When he told you that this stock was selling on the over-the-counter market didn't you understand by that that the Chase Securities Corporation was selling this stock just like, let's say, a grocer sells a loaf of bread or a pound of butter over his counter?

A. Well, I don't—didn't understand that was the way the set-up was. I thought they issued a certain number of shares of stock and it was sold by the company and if you owned some and you were willing to sell it at a particular price and I was willing to buy at a certain price I could [fol. 252] buy what you had.

Q. Well, then——

A. I didn't know they sold it directly to me, that it was their own stock, I mean that they had in their own pocket. I supposed it was just for sale on over-the-counter market, the same as in any stock market. I don't know an awful lot about these things.

Q. Well, was there any difference in your mind between the over-the-counter market and the regular established market like the New York Stock Exchange or Chicago Exchange and public markets like that?

A. I don't know as there is any difference.

Q. Now, is it not a fact, Mrs. Donaldson, that you knew and understood at the time that the Chase Securities Corporation was selling the stock to the public?

A. They were selling what they had themselves to the public?

Q. No, they were acting as sellers or dealers. That is, they might buy a share of stock from John Jones, who had it to sell.

A. Yes.

Q. And then if Bill Smith wanted to buy some stock and he went to the Chase Securities Corporation to buy it, then the Chase Securities Corporation would turn around and sell it to Bill Smith who wanted to buy it.

A. I didn't know, no. I thought it was just on a market like anything else. I didn't know they handled it as an agent [fol. 253] themselves. Maybe they did. I don't know. They may or may not. I don't know.

Q. My point is didn't you understand and weren't you so advised by the salesman who talked to you——

A. No, I was not.

Q. —that the Chase Securities Corporation was offering this stock for sale and was selling it to the public?

A. No, I was not——

Mr. Streissguth: Its own stock?

The Witness: No, I was not so advised. I don't believe I was told that.

Q. I see. Now did you ever tell anyone that the Chase Securities Corporation was selling this stock to the public?

A. Did I ever tell anyone?

Q. Yes.

A. No.

Q. Did you ever say to anyone that the Chase Securities Corporation was offering this stock for sale?

A. No, I don't suppose so.

Q. On or about December 21, 1936, didn't you sign an affidavit in which you said the following, "That at or about the time alleged in the complaint the defendant, through its said Minneapolis office and through the salesmen therein employed, was soliciting, offering and selling shares of stock of the Chase National Bank and of the Chase Securities Corporation to divers persons throughout the state of [fol. 254] Minnesota"?

Mr. Streissguth: Is that the same affidavit you had this morning?

The Witness: That is the same affidavit.

Mr. Palmer: That is the same one.

The Witness: Well, I admit that. I thought that you meant did I go around telling my friends that they were selling stock.

Q. I am sorry you misunderstood. My question is did you understand that the Chase Securities Corporation was selling its stock or selling stock, acting as a seller at the time of this transaction in 1929?

A. Well, I don't know whether I understood exactly what they do. As I said before, I don't know whether they were agents for their own stock or not. That affidavit, if I said that in that thing, it was drawn up by my lawyer, and I suppose he understood the legality of it. I don't.

Q. Well, you read the affidavit over before you signed it?

A. Yes, I did.

Q. And——

A. I was advised by him that that was what it was.

Q. You read this statement here, "At or about the time alleged in the complaint the defendant through its Minneapolis office and through its salesmen therein employed, was soliciting, offering and selling shares of stock of the Chase National Bank and of the Chase Securities Corporation to divers persons throughout the state of Minnesota"?

[fol. 255] Mr. Streissguth: Just a minute. Let him finish the question.

Q. You did make that statement in this affidavit and you signed the affidavit, did you not?

Mr. Streissguth: The objection is, your Honor, that this statement was made in 1937 in light of facts which were discovered at or about that time, the time that she discovered the fact that they were selling that. That doesn't impeach her testimony in 1929 when she bought this stock she was buying over the counter, and an over-the-counter deal, there is nothing inconsistent with it. Objected to as not impeaching.

A. What is the question?

The Court: I think counsel has admitted she signed that affidavit.

A. Yes, I admitted that this morning.

Mr. Streissguth: We offered it in evidence and you don't want it in evidence.

Mr. Palmer: Only certain portions were offered and I am prepared to offer additional portions.

Mr. Streissguth: I want it all in.

Q. I will start over again. Didn't you say in this affidavit the following, "At or about the time alleged in the complaint the defendant, through its said Minneapolis office and through the salesmen therein employed, was soliciting, offering and selling shares of stock of the Chase National Bank and of the Chase Securities Corporation to divers persons throughout the state of Minnesota"?

Mr. Streissguth: The same objection as to the preceding question.

[fol. 256] The Court: She may answer.

A. Didn't I say that in the affidavit?

Q. I am asking you if you didn't make that statement in this affidavit?

A. Yes, that is in there.

Mr. Palmer: We offer in evidence, your Honor, the statement contained in the last part of the second paragraph on page one of the affidavit which plaintiff admitted this morning that she had signed, the statement reading as follows: "On or about the time alleged in the complaint the defendant, through its said Minneapolis office, and through the salesmen therein employed, was soliciting, offering and selling shares of stock of the Chase National Bank and of the Chase Securities Corporation to divers persons throughout the state of Minnesota."

Mr. Streissguth: That is objected to on the same ground as the previous question was objected to and on the further ground that it is only part of an affidavit. We have no objection to the affidavit being offered as a whole, although we think it is not impeaching.

Mr. Palmer: I submit it, your Honor, as an impeachment and as an admission.

The Court: It will be received.

Q. Now didn't you further say in the affidavit the following, "That the transaction referred to in the complaint was initiated, carried on and completed at the City of Minneapolis, Minnesota, at the time alleged in the complaint in the course of continued and successful sales of like stock

[fol. 257] of the defendant and the Chase National Bank to divers persons in the state of Minnesota"?

Mr. Streissguth: If that is in the affidavit we will admit that it is so stated in the affidavit.

A. I did.

Mr. Palmer: I prefer to have the witness answer.

The Witness: I signed the affidavit.

Mr. Streissguth: It is all in the same affidavit.

Q. Do you admit having made that statement in this affidavit? Is that right?

A. I do.

Mr. Palmer: We offer in evidence from Defendant's Exhibit 6 the statement just referred to, which reads as follows: "That the transaction referred to in the complaint was initiated, carried on and completed in the City of Minneapolis, Minnesota, at the time alleged in the complaint in the course of continued and successful sales of like stock of the defendant Chase National Bank to divers persons in the State of Minnesota." We offer it both as an impeachment and as an admission.

Mr. Streissguth: We object to it on the ground that it is not impeaching and on the further ground it appears from the defendant's answers and from the defendant's own affidavits they have always claimed the same. There is nothing inconsistent about it. Your Honor, we claim that there was a sale in this case although it started out as a solicitation, but we have always claimed that there was a sale.

[fol. 258] Mr. Palmer: You admit that this transaction was a sale and was known to be such?

Mr. Streissguth: We have stated our position at the opening of the trial. There is no use of confusing it.

The Court: I think I will receive this offer although I don't remember just how that is impeaching, but it is in for what it is worth.

Q. Now, Mrs. Donaldson, didn't you understand that about the time of this transaction that you were purchasing the eight shares of Chase Bank stock from the Chase Securities Corporation?

Mr. Streissguth: Do you mean whether she understood that at the time or later?

Mr. Palmer: I am not qualifying my question.

Mr. Streissguth: I object to it as indefinite as to time. You better qualify it.

The Court: I think the question says at the time. Read the question.

Mr. Streissguth: You refer to in 1929?

(Question is read by the reporter.)

A. I bought the stock. Now I don't know much about the legality of it, I admit that. I gave Mr. Jepson an order to buy this stock. Now that is all I know.

Mr. Palmer: I move to strike the answer out as not responsive to the question. I didn't get it all.

A. I said I gave Mr. Jepson an order—

The Court: Just a moment. Read the answer.

(The answer is read by the reporter.)

Mr. Palmer: The question relates to bought from whom? [fol. 259] That is the point I am getting at.

Mr. Streissguth: She has told you what she knows.

The Court: I think I will let the answer stand.

Q. Did you understand that you had bought the stock from the Chase Securities Corporation at about that time?

A. Well, I don't know much about whether you buy it from the company, as I said before, or whether you—whether they own it or whether it is just on the market. I really don't understand about that. I admit that.

Q. What didn't you understand—

A. I don't know whether—

Q. You didn't understand they owned the stock?

A. When you said you could buy it like groceries, I didn't think you could. I mean I didn't know they kept all the stock themselves and sold it out to you. Do you understand me?

Q. Did you understand if they didn't have any stock to sell you they could buy the stock from somebody else and then turn around and sell it to you, just like a grocer who might be out of Land of Lakes butter and you wanted Land of Lakes butter and sent over to his neighboring grocer and got you a pound and sold it to you?

Mr. Streissguth: Objected to as argumentative and not cross-examination.

A. I don't know if they do it that way or not.

Mr. Palmer: I am just trying to clarify this. The witness said she didn't understand.

The Witness: I don't understand.

[fol. 260] The Court: She may answer, if she hasn't already answered the question.

The Witness: I don't understand it. I don't know what it is.

Q. As I understood your answer it was that you did not know whether the Chase Securities Corporation sold you this stock as the owner of it—

A. Yes, out of their own pocket.

Q. —that is, it had the stock in its possession which it could take out of its own portfolio and sell you?

A. That is right.

Q. Now my point is this, assuming the Chase Securities Corporation did not have any stock in the portfolio.

A. Yes.

Q. Nevertheless you understand that the Chase Securities Corporation might buy it from some other certain party and then turn around and sell it to you. You can conceive of that situation, can you not?

A. Yes, I can. I can conceive of it. I don't know if they do it. I don't know whether that is the way it is done.

Q. Now, in that situation that we are thinking about it would be your understanding that the Chase Securities Corporation, notwithstanding the fact that it didn't have the stock in its possession, was acting as the seller to you.

Mr. Streissguth: Just a moment. Objected to as assuming a fact not in evidence, argumentative and not proper [fol. 261] cross-examination.

The Court: Have you finished your question?

Mr. Palmer: Well, I guess it was near enough, your Honor.

The Court: It was hardly a question, was it? It was more or less of a statement. Objection sustained.

Mr. Palmer: Would you mark for identification Defendant's Exhibit 7?

(Defendant's Exhibits 7 and 7-A are marked for identification.)

Q. Didn't you say on or about October 11, 1937, in a letter signed by you the following: "On or about August

8, 1929, the undersigned purchased of the Chase Securities Corporation through its Minneapolis office eight shares of the capital stock of the Chase National Bank in the City of New York and eight shares of capital stock of the Chase Securities Corporation at the agreed price of $1,828.00 for all of said shares, which sum was then and there paid to said Chase Securities Corporation"?

A. I wrote that——

Mr. Streissguth: It will be admitted that she so said.

The Witness: Yes, I wrote that—I mean I signed that letter. I think Mr. Donaldson wrote it.

Q. Do you recall if that statement was made in that letter?

A. Well, yes, in substance it was the same.

Q. Now, didn't you say in that same letter the following: "All of this stock was purchased by the undersigned from [fol. 262] your company at the time when the stock of the Chase Securities Corporation was not registered under the Securities Act of the State of Minnesota"?

A. Yes, if you are reading from that letter, yes.

Mr. Palmer: If you will mark for identification Defendant's Exhibit 8.

(Defendant's Exhibit 8 marked for identification.)

Q. Mrs. Donaldson, calling to your attention Defendant's Exhibit 8 which purportedly is a carbon copy of a letter addressed to Mr. and Mrs. Frank A. Donaldson under date of August 15, 1929, I will ask you if you ever remember having received the original of that letter?

A. No, I don't remember receiving it but I undoubtedly did.

Q. You undoubtedly think you got the original?

A. I suppose we did, but I wouldn't remember. I didn't remember it was verified that way at all. I couldn't remember, as I told you, whether we telephoned or—I have no recollection.

Q. Do you remember making any reply to any such letter as that?

A. No, I didn't make any reply, I am quite sure. Mr. Donaldson may have.

Mr. Palmer: We offer in evidence Defendant's Exhibit 8.

The Witness: I didn't read that all through.

Q. Here is a photostat.

[fol. 263] A. Oh, thank you.

Mr. Streissguth: This is a letter, I take it, from Schuyler B. Terry, vice president of the Chase Securities Corporation?

Mr. Palmer: I understand so.

Mr. Streissguth: And it is in the stereotyped regular form, You don't claim——

Mr. Palmer: I have seen letters like that before, Mr. Streissguth. Whether it is a stereotyped form I don't know.

Mr. Striessguth: The objection to that, your Honor, is self-serving and immaterial. It is merely a letter of thank you from Schuyler B. Terry for the initial order.

Mr. Palmer: We offer the letter and the circumstances which the witness has testified about as an admission and as impeachment on the point that you dealt only with Mr. Weir Jepson. Now this letter reads, "I want to take this occasion to thank you for your order of August 12 for Fifty and eight shares respectively of the Chase National Bank and Chase Securities Corporation stock given our Mr. Owen Devine." Now to the best of her knowledge she made no reply to that letter. Now under the circumstances, if Mr. Jepson was the one from whom the stock was purchased or the one who solicited the sale, it seems to me that the plaintiff of this business intelligence, business experience, would have written the company and seen to it that Mr. Jepson was given the credit for the sale.

Mr. Streissguth: Is it your claim that Owen Devine had anything to do with this purchase? Do you claim that, that [fol. 264] Owen Devine had anything to do with it?

Mr. Palmer: According to the statements he did have.

Mr. Streissguth: What is your claim? You have records. What is your claim on that point?

Mr. Palmer: I have records. You know what the records are just as well as I do.

Mr. Streissguth: We will call Mr. Devine, if you insist, but I want to know what your claim is.

The Court: The witness, as far as this letter is concerned, doesn't remember receiving it.

Mr. Streissguth: It is a purely self-serving statement on the part of Mr. Terry.

Mr. Palmer: As I recall it, she said she didn't remember receiving it, but that she undoubtedly did receive it. That is as I recall the testimony. I may be in error.

Mr. Streissguth: The letter is not addressed to her and she doesn't recollect receiving it, addressed to Mr. and Mrs.

The Court: I think I will sustain the objection at this time.

Mr. Palmer: If the court please, I have no further cross examination at this time. However, there are some points that I do wish to recall the witness for further cross examination about. I would like to receive the right to call her further for cross-examination without limitation as to any issue that I have examined her upon outside the scope of course of the direct examination.

The Court: That is all.

[fol. 265] Redirect examination.

By Mr. Streissguth:

Q. We have some redirect examination. May I have that tender letter? Will you produce the letter of tender?

Mr. Palmer: May it also be understood photostatic copies can be substituted for the original exhibits offered and received?

The Court: It seems that is agreeable all around.

Q. Mr. Palmer read to you from a letter marked Exhibits 7 and 7-A. Just look at that letter, Mrs. Donaldson, and say whether you recollect having signed that letter?

A. Yes, I signed this letter.

Q. And along with that letter did you enclose some certificates of stock?

A. This letter was written at the same time that the stock was tendered to the Chase company.

Q. And were the two certificates of stock which were enclosed, were they endorsed?

A. Yes.

Q. Properly endorsed in the name of Ruth Chase Donaldson?

A. Yes, they were.

Q. And I believe they have already been introduced in evidence, although I don't have their number. That would be the certificates introduced August 6th, showing you the

two original certificates I have in my possession, one for nine shares in the Chase National Bank and one for one share in the Amerex Holding Corporation, did you enclose [fol. 266] those two certificates, properly endorsed in blank, with your letter?

A. Yes.

Q. And mail the letter?

A. And mailed the letter by registered mail.

Mr. Streissguth: Those certificates, your Honor, that I have referred to have been introduced in evidence as Exhibits O and P.

Q. Now did you receive a reply from Amerex Corporation?

A. Yes, there was a leter in answer to this about six weeks afterwards.

(Plaintiff's Exhibit A-5 marked for identification.)

Q. Was that letter mailed to the Amerex Holding Corporation on or about the date it bears, October 11, 1937?

A. Yes.

Q. And state whether or not on or about November 29, 1937, or about six weeks afterwards, the stock was returned to you with this letter, Plaintiff's Exhibit A-5?

A. Yes, it was.

Mr. Streissguth: I offer Plaintiff's Exhibit A-5 in which the tender is rejected.

Q. Now I notice from these letters, Mrs. Donaldson, that you tendered——

The Court: Is there any objection?

Mr. Palmer: No objection.

The Court: Received.

Q. —a full share of Amerex, and I believe you testified [fol. 267] at the time of the split you got scrip for 9/10ths of a share.

A. Yes.

Q. How did you acquire the additional 1/10th?

A. I believe I received a letter suggesting I buy the other 10th of the share to make it a full share, and I did that.

Mr. Streissguth: Now, Mr. Palmer, will you produce the letter from the Amerex to the stockholders advising them

to pick up the fraction of the shares?. I don't whether we asked you to produce it specifically, but you have it, don't you?

Mr. Palmer: I will look for it if it is in my file.

Mr. Palmer: Just a minute. I will see if I can find it.

Mr. Streissguth: You can't produce the letter of instructions?

Mr. Palmer: I don't find it.

Q. Did you at the time that you acquired the scrip for 9/10ths of a share in Amerex round out that by buying an additional 1/10th share?

A. I did.

Q. Through the Chase National Bank?

A. I did.

Q. Showing you Plaintiff's Exhibit W, is that the receipt you received for $2.45, representing the 1/10th share of Amerex which rounded out your one share?

A. Yes, sir.

Mr. Streissguth: We offer Plaintiff's Exhibit W in evidence.

Mr. Palmer: If the court please, we object to this on the [fol. 268] ground that it is irrelevant. It has nothing to do with the issues in this case. It is apparent that she bought this fractional share or fractional certificate by order of the Chase National Bank. The Chase National Bank is not a party and, as far as I recall, there is no point made in the complaint that recovery is sought upon this purchase of a fraction of a share.

Mr. Streissguth: We are prepared to show and we have asked for it, that by the joint letter from the Chase National Bank and the Chase Securities Corporation this additional 1/10th share was purchased. Now, if you are going to be technical about it, we are going to insist that you produce that printed letter. We have a copy of it in the Vogel transcript, a joint letter from the two institutions, but it goes to show how the additional 1/10th was acquired and the further point was this, your Honor, that the Chase National Bank and Chase Securities Corporation, in so far as the admissions in the answer are concerned, in so far as we can prove in just a few minutes were one and the same institution. They were Siamese Twins. What the Chase National Bank did, they did as part of the same corporate set-up as

the Chase Securities Corporation. We are just trying to show, however, where this one whole share came from, but if counsel wants to stand on his objections we insist he produce the letter I speak of, a joint letter from the two corporations.

Mr. Palmer: If the court please, counsel has asked me to produce a long list of documents, over fifty various items [fol. 269] in his notice to produce. I have tried diligently and I have worked a long time trying to produce the documents. I find no reference to this so-called joint letter from the Chase Bank and the Chase Securities Corporation in my files. However, I will do my best to produce it, if it is a Chase Securities record. Now, as far as the Chase Bank and Chase Securities Corporation being Siamese Twins is concerned, or in any way connected, that statement is positively absurd. Counsel, in his complaint, takes the position throughout that the two were separate corporations. In fact the foundation of his cause of action is based upon the theory that the two are separate corporations and that the stock of the Chase Securities Corporation therefore had to be registered with the Commissioner of Securities. If he is now taking the position that the Chase Bank and Chase Securities Corporation are one and the same, then this issue of registration of stock is out of the case and the stock is exempt as the stock of a national bank.

Mr. Streissguth: Mr. Palmer, calling your attention to paragraph nine of this notice to produce, which requires you to produce all letters, correspondence addressed and directed by the plaintiff to the defendant, now I ask you to produce this at the present time.

Mr. Palmer: Now, if the court please, I have——.

Mr. Streissguth: Number nine.

Mr. Palmer: —not in any way said anything which de- [fol. 270] tracts from what I have previously said. He calls for the production of documents of the defendant, the Chase Securities Corporation, and this slip on its face apparently shows that this was a purchase through or from the Chase National Bank. We don't have the records of the Chase National Bank.

The Court: You may renew your offer later.

Mr. Streissguth: Yes, although I think without that additional foundation this thing is still relevant and material as to how she acquired the additional 1/10th. We are not

asking for the $2.45, your Honor. We are just trying to explain to the court how the one share was acquired. We don't ask for the additional $2.45.

(Recess.)

Q. Now I omitted to ask you yesterday and this morning when I had you on the witness stand with reference to the statements that were made by Mr. Jepson at the time that he made the sale. State whether or not you believed the statements that were made by Mr. Jepson to you in respect to the stock that was being sold to you to be true.

A. Yes.

Mr. Palmer: If the court please, I shall object to that as improper re-direct.

Mr. Streissguth: Well, it is improper re-direct, but I overlooked it, Mr. Palmer.

The Court: Overruled. She may answer.

Q. And did you rely upon the statements that he made to you at that time?

Mr. Palmer: Same objection.

The Court: Same ruling.

[fol. 271] A. Yes, I did.

Q. Now, we have shown you this letter in which you tendered the stock, bearing date of October 11, 1937. I will ask you when it was that you discovered, as you say in your letter, that this stock that was sold to you, the stock, the Chase units, when did you discover that this was not registered under the Securities Act of the State of Minnesota?

Mr. Palmer: If the court please, I shall object to that as improper re-direct. It is a proper requirement in the plaintiff's main case.

The Court: Overruled. She may answer.

A. Shortly before this letter was written Mr. Donaldson came home and said that he had heard something about this and I got in touch with Mr. Streissguth because Mr. Donaldson had heard he had tried some similar cases or knew he handled some cases of that sort, and then we tendered the stock, wrote this letter and tendered the stock to the company.

Q. Had you known this man Streissguth before that?

A. Yes, I knew Mr. Streissguth for twenty-five years or more.

Q. Was he a friend of the Chase family?

A. He was, yes.

Q. When was it that you discovered for the first time, you say nothing about it in this letter, that Mr. Jepson was not a licensed agent of the Chase Securities Corporation, or I mean licensed in Minnesota?

Mr. Palmer: I shall object to that, your Honor, on the [fol. 272] ground it is improper re-direct and that the matter of his discovery is not well pleaded in the complaint and raises no issue but a conclusion of law.

The Court: I think she may answer. Overruled.

A. Well, I think when we looked into this matter about the securities we found that he was—he hadn't any right to sell here, either.

Q. Yes, but in respect to the date on this letter, was it before or afterwards that you discovered that situation?

A. Oh, I think——

Mr. Palmer: I shall renew my objection, your Honor.

The Court: Same ruling.

A. I think it was before the letter was written.

Q. Now, state whether or not before the time that you have referred as being shortly before this letter was written, whether you had in any way heard or read of anything that put you on guard or made you inquire in respect to the matter other than you have already testified to.

Mr. Palmer: If the court please, I shall object to this on the ground it calls for the opinion and conclusion of the witness; that it is not proper redirect and is irrelevant because of the fact that the so-called issue of discovery was not well pleaded, is nothing more than a conclusion of law.

The Court: Of course it isn't re-direct, but on counsel's statement——

[fol. 273] Mr. Streissguth: No, I will withdraw it in that form.

Q. You have mentioned the fact that Mr. Donaldson mentioned it to you shortly before you mentioned this letter?

A. Wrote this letter.

Q. Wrote this letter.

A. Yes.

Q. My question is simply this, prior to that time, prior to your conversation with Mr. Donaldson had you read or heard anything about the fact that this stock of the Chase Securities Corporation was not registered or that Mr. Jepson, the agent, was not licensed in Minnesota?

Mr. Palmer: I shall renew the same objection.

The Court: Upon statement of counsel that he overlooked this in the direct, I will permit him to examine. Overruled.

A. No, I had never heard anything about it until that time.

Q. Had you heard prior to that time anything to the effect that the Chase Securities Corporation, through its own corporation and its subsidiaries, was engaged in pool operations and in manipulation of this stock?

A. No.

Mr. Palmer: I shall renew my previous objections, emphasizing that it calls for an opinion and conclusion of the witness; not based upon any facts in evidence in the case.

The Court: She may answer that Yes or No. Overruled.

[fol. 274] A. No.

Q. And during all of the time from the time you made your purchase in 1929 to the time that you discovered the facts, as you say, in 1937, did you know during that period and up to 1937 and had you ever heard or read that this stock was not registered or that Mr. Jepson was not licensed to sell?

Mr. Palmer: I shall renew my objections, and each and all of the objections previously made and urge the further ground that the matter is repetition.

The Court: I think she covered that when she said she never heard.

Mr. Streissguth: Possibly.

Q. Now, there has been a considerable reference to the Donaldson Company, so-called, located on Pelham Street in the Midway District, is that true?

A. Yes.

Q. Of which your husband is president?

A. Yes, sir.

Q. State whether or not that is a family corporation.

A. It is a family corporation.

Q. Whether any stock is owned in that corporation outside of the Donaldson family.

A. There is none owned outside.

Q. And whether you ever did take any active part in that corporation other than attending the annual meeting of the directors?

Mr. Palmer: If the court please, I shall object to that as [fol. 275] not proper re-direct and it calls for a conclusion of the witness.

The Court: It was brought out in cross examination.

Mr. Palmer: It seems to me that it is too broad in scope and covers a field unlimited.

The Court: Objection will be overruled.

A. I have never taken any active part in the board or anything else in regard to the Donaldson Company with the exception of an annual meeting that I attended.

Q. Did you ever buy a share of stock prior to your purchase in 1929 of the Chase Securities Corporation?

A. No, sir, I never did.

Q. Did you ever yourself prior to that time buy any bonds, that is, you being in active charge of the purchase?

A. No, I never did.

Q. The matter of purchasing bonds, or acquiring bonds, who handled that?

A. The Chase Investment Company, my brothers and my father.

Q. And did you have any income outside of the income from these bonds and the income from your share of the family real estate or apartments?

A. No, I had no other income.

Mr. Streissguth: That is all. Did we offer this exhibit, letter of tender, Exhibit 7? I think it has been offered.

The Court: Do you offer 7?

Mr. Streissguth: We offer Exhibit 7. I think there was no objection, was there, John?

Mr. Palmer: The tender letter? Well, in so far as this letter attempts to establish a tender, I object to it on the ground that it is insufficient tender of the securities, that it does not constitute a valid legal tender of law. Otherwise we have no objection.

The Court: That has already been received.

Mr. Streissguth: We also offer Plaintiff's Exhibit A-5, if we haven't already done so, the letter rejecting the tender.

The Court: A-5 is received.

Mr. Streissguth: We again tender to the defendant certificate of stock No. 170762, nine shares of the capital of the Chase National Bank of the City of New York, now in the name of Ruth Chase Donaldson, and endorsed by her in blank, together with certificate No. 067711 for one share of stock in the Amerex Holding Corporation, also in the name of Ruth Chase Donaldson, and by her endorsed in blank. We tender to the defendant with this stock all dividends which have been received by her from the time of the acquisition of the stock until the date of the trial and interest at six per cent on these dividends from the date of their payment to the plaintiff and any other dividends or rights of any kind that the plaintiff may have received as the holder of these shares of stock.

Mr. Palmer: If the court please, I don't suppose that it is technically necessary for the defendant to formally reject [fol. 277] the tender. The matter of rescission and sufficiency of the tender is something for the court to decide as a matter of law in the case. However, for the purposes of the record the defendant does object to the tender, urging all of the grounds which are stated by it in paragraph Arabic numeral 6, which is a sub-paragraph of paragraph 11 of the defendant's answer. We object, as therein stated, to the tender on the ground that the plaintiff is not able to tender back to defendant within six years of the date of the transaction her stock which is the same and which carries with it the same rights, duties, privileges and obligations as the stock which she originally purchased; that she is unable to do so, among other reasons, because of changes in the corporate structure of the defendant corporation which she has been informed about, which she has known about and acquiesced in. These corporate changes are all set forth in our answer. The corporate changes are found as sub-paragraph Arabic numeral 7 of allegation Roman numeral 11 of our answer and by reason of all of the corporate changes set forth in that paragraph of our answer we reject the tender. In addition the tender is not formally sufficient. There is no tender of the dividends which she has received in cash. There is no showing, as I recall the certificates, that proper transfer stamp taxes have been

affixed to the certificates, and that the tender is not technically and at law sufficient.

Mr. Streissguth: We don't want any discussion about that. Here is the tender in cash of the dividends. Have [fol. 278] the record appear that I am now tendering in cash the equivalent of all the dividends with interest on the dividends. Here it is, John.

Mr. Palmer: If the court please, in addition to the grounds which we urged for rejecting the tender, we reject the tender upon all of the reasons and upon all of the grounds which we are contesting this case on.

Mr. Streissguth: Well, I don't want any—I want the record to show, your honor, that I have $350 here in cash that I am tendering along with the stock as full payment of all dividends and all interest on dividends. So you are not making any point of that.

Mr. Palmer: Well, I have made all of my points. I tried to include everything. If I omitted anything I would like to have the privilege of going back.

Mr. Streissguth: In any event the tender we made of stock is kept open and will be available to the defendant at any time between now and the entry of judgment in this case.

The Court: Is that all with this witness?

Mr. Streissguth: That is all, yes. I will call Elbridge Chase.

Mr. Palmer: If the court please, I have some cross-examination.

[fol. 279] Recross-examination.

By Mr. Palmer:

Q. You and your husband are regular subscribers to the Minneapolis Journal here in Minneapolis, aren't you?

A. Yes.

Q. Don't you read the Minneapolis Journal almost daily?

A. Not from "kiver to kiver."

Q. You read the front page, though, don't you?

A. Well, I wouldn't say that I read it all. I probably glance through the headlines, at least usually.

Q. And don't you, as generally a regular thing, read the front page and scan the headlines of the front page in the Journal?

A. Yes, I would say generally.

Q. Now, calling your attention to October 11, 1935, I will ask you if you recall reading an article which purportedly appears on the front page to this effect, "Blue Sky Law Is Sustained in Test Case. A test case on the validity of the security sales of 1929 for the Chase Securities Corporation and the Amerex Holding Corporation of New York was won by a Minneapolis man in Hennepin County court today when Judge W. W. Bardwell handed down a ruling the sales were a violation of the Blue Sky Law. The purchase price of the securities was ordered returned." Do you remember reading an article to that effect on or about October 11, 1935?

Mr. Streissguth: Show her the article. (Handing paper [fol. 280] to witness.)

A. No, I didn't read it. I missed that, I guess.

Mr. Streissguth: What was your answer?

The Witness: No, I didn't see it. No, I didn't see it.

Q. You didn't see any such article?

A. I never saw any such article.

Q. Did you ever hear your husband mention any such article?

A. No. Not—I don't think that he ever mentioned such an article. I think he told me that he had heard someone say something about this.

Q. At or about the—in about 1935?

A. About the legality of the Chase being able to sell in the state of Minnesota, and that Mr. Streissguth, as I said before, had handled some cases along that line.

Q. Was that in 1935?

A. That was in 1937, the fall of 1937.

Q. The fall of 1937?

A. Yes.

Q. Do your folks take the Minneapolis Star?

A. No, we don't.

Q. Does your husband occasionally buy it and bring it home?

A. No, he doesn't.

Q. Do you occasionally buy it and bring it home?

A. No.

Q. Have you ever read the Daily Star of Minneapolis in the year 1935?

A. I wouldn't be able to say that I never have seen one [fol. 281] in that year.

Q. Do you remember reading an article in the Daily Star on or about October 11, 1935, which deals with a Blue Sky case involving the stock of the Chase Bank and Chase Securities Corporation?

A. No, I never read any such article.

Q. Now, in the year of 1933 do you remember of reading about the investigation being conducted in Washington by the committee, Senate Committee of Banking and Currency?

A. No.

Q. Do you remember reading about that time an investigation being conducted into the affairs of the National City Company and the affairs of the Chase Securities Company?

A. No. Oh, I knew that the National City, something was done about it, some time or other.

Q. Well, do you recall having heard anything about that investigation by the Committee of Banking and Currency in Washington in the year 1933?

A. No.

Q. You don't remember reading anything whatsoever about it?

A. No.

Q. Do you recall ever having heard it discussed in 1933, this investigation or an investigation of the National City and Chase Securities Corporation?

A. No.

Q. Calling your attention to Plaintiff's Exhibit Q, I will ask you if you saw that at or about the time of this trans- [fol. 282] action in Chase Bank stock?

A. I don't believe I ever saw this. I think the only thing I ever had was confirmation slips. What is this? I don't know.

Q. Did you ever see this order here, this order plaintiff's Exhibit Q, before you saw the confirmation slip?

A. No, I don't think so.

Q. Now, calling your attention to plaintiff's Exhibit Q, I will ask you to look it over and tell us whether it is a correct memorandum of your transaction.

Mr. Streissguth: Now, just a minute.

A. Well, I don't know.

Mr. Streissguth: That is objected to on the ground that this is an office memorandum prepared at the office of the Chase Securities Company in Minneapolis and it calls for a conclusion. It is not binding upon the plaintiff. She has testified as to how the transaction occurred. I don't think it is proper cross examination.

The Court: Did she say she had never seen that?

A. I have never seen it, no, but I——

Mr. Palmer: I am asking her, however, if it is a correct memorandum of the transaction, however, notwithstanding the fact that she didn't see it.

A. I wouldn't have the least idea. I don't know enough about how they make them out.

Q. Calling your attention to Plaintiff's Exhibit R-2, I will ask you if you saw this exhibit at about the time that [fol. 283] you got your Chase stock.

A. No, I didn't see this one, but mine was like this quite a lot. It was—mine down here it is a little different. It is about this size. It is a white one with red letters.

Mr. Streissguth: It is there, John. R-1.

Mr. Palmer: Have you got it?

Mr. Streissguth: No, it must be there. I am sure it is there. Don't you want it?

Mr. Palmer: No, it isn't a matter of any particular importance.

Q. Were you a shareholder in the Donaldson, Inc., Donaldson Company, Incorporated, a Minnesota corporation, in 1929?

A. No.

Mr. Streissguth: That has been covered.

A. You asked me about that once before this morning.

Q. Did I? I don't recall having asked you if you were a shareholder of the company in 1929.

A. Maybe you didn't. I just thought you did. Maybe you asked me if I was a director. I don't know.

Q. Just to make certain, what is your recollection, were you a stockholder in the company in 1929?

A. No.

(Witness excused.)

[fol. 284] ELBRIDGE CHASE, sworn in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Streissguth:

Q. Your name is Elbridge Chase?

A. Yes.

Q. Speak out, so the reporter can hear you.

A. Yes.

Q. You are also known as E. S. Chase?

A. Yes.

Q. Are you a brother of Mrs. Donaldson?

A. Yes.

Q. And a son of C. W. Chase?

A. Yes.

Q. I am showing you now Plaintiff's Exhibit A-1, a check dated August 20, 1929, bearing the signature of E. S. Chase; is that your signature?

A. Yes.

Q. And the account apparently is the Chase Investment Company?

A. Yes.

Q. Will you tell the judge what the Chase Investment Company was at that time, whether it was a corporation or what it was?

A. The Chase Investment Company was Charles W. Chase doing business under that name.

Q. It was your father, doing business under that name?

A. Yes.

Q. Did any of the children have any interest in the Chase [fol. 285] Investment Company?

A. No.

Q. Did he handle, as agent, some of the apartment houses that were owned by the family?

A. Yes.

Q. And did some of the children, including Mrs. Ruth Chase Donaldson, receive incomes from these apartment houses?

A. Yes.

Q. And as this income was received from these buildings, was that credited to the accounts of the children?

A. Yes.

Q. And is that the book that you produced here today, which distributes the incomes?

A. Yes.

Q. The net income?

A. It is the ledger.

Q. Now is the Chase Investment Company incorporated at the present time?

A. Yes.

Q. When was it incorporated?

A. Two years ago.

Q. After your father's death or before?

A. No, just prior.

Q. Does your sister, Ruth, Mrs. Donaldson, have any interest as a stockholder in the Chase Investment Company, the corporation?

A. No.

Q. Did she ever have?

A. No.

Q. So that as I understand it, Elbridge, up to the time [fol. 287] of its incorporation this was just a convenient name used by your father in transacting his business and business for members of the family?

A. Yes.

Q. Now, this check, Exhibit A-1, bearing your name, is made out to the First National Bank?

A. Yes.

Q. State whether or not it was delivered to the First National Bank of Minneapolis

A. It was.

Q. And whether or not it was given to the bank in payment of eight shares of stock of the Chase National Bank and Chase Securities Corporation.

A. It was.

Q. To whose account did you debit or charge this check of $1,828 on your books?

A. Ruth Donaldson.

Q. To Ruth Donaldson?

A. Yes.

Q. And is that entry shown on the page covering the 1929 transactions?

A. Yes.

Q. And the stock itself, the eight shares having been received from the First National Bank, to whom were they eventually delivered?

A. Ruth Donaldson.

Q. To your sister?

A. Yes.

Mr. Streissguth: That is all.

[fol. 287] Cross-examination.

By Mr. Palmer:

Q. Mr. Chase, who held the title to the property the income of which was credited to the children on the books of the company?

A. It was held by the individuals interested in the property.

Q. And by that you mean——

A. An undivided share of certain pieces, there were six undivided interests, each undivided interest was represented in the title that person's name was on the—the title stood in that person's name, including all the others.

Q. And every one of your brothers and sisters, as I understand you, and you will pardon me if I repeat myself because I didn't hear very distinctly, every one of you had a separate share in the separate undivided share in the property?

A. No, it is a big family. Some of my brothers and sisters would be interested in one piece of property and others in other pieces of property.

Q. I see.

Mr. Streissguth: There were thirteen children. were they not, at one time?

The Witness: Twelve.

Mr. Streissguth: Twelve or thirteen.

Q. In 1929 how many children were there? Were there but six in 1929?

A. No, there were twelve.

Q. There were twelve?

A. Living.

Q. Did I correctly understand you to say that there were [fol. 288] six undivided shares in the property?

A. I just made an example of that. If there were six interested parties in a piece of property, there would be undivided interests in the title, which stands in the name of the six, each holding an undivided interest in that particular piece. Others, there was some pieces that—where there were eight interested parties, the title stood in the name of the eight.

Q. Did I understand that this property was held jointly or what we call in joint tenancy by all the members of the Chase family?

Mr. Streissguth: Tenancy in common.

A. Well, as I have said before, some pieces of the property controlled by my father he had no interest in at all. There might be five, four, five, six or seven, or even eight of the children interested and he himself might have had an undivided interest in some pieces but they were all managed by him.

Q. But the title stood in the joint names of all of you, whether as tenants in common or as joint tenants?

A. Well, if there were six parties interested in a piece of property the title stood in the name of those six. If there were four interested in a piece of property, the title stood in the name of the four.

Q. When you recite four or six people, the people you refer to are members of the Chase family?

A. Yes, in every instance.

Q. In every instance. Now, was that arrangement confined to real estate did it extend to bonds, mortgages and [fol. 289] stocks and other types of securities similar to that?

A. It didn't extend to any stocks. For instance if stocks—or I mean any bonds. If a bond were bought, it was bought for some one of the individuals, provided that individual had accumulated enough funds to pay for the bond. We invested their money if it was accumulated to their credit on our books.

Q. In the period preceding the purchase of this Chase Bank stock in 1929, three-year period prior to that time, had the Chase Holdings which belonged to your sister, Mrs. Donaldson, paid her an income regularly?

A. I think so, yes.

Q. And since that time her holdings have paid her an income regularly also?

Mr. Streissguth: Objected to as immaterial.

Mr. Palmer: This is all leading up——

Mr. Streissguth: We are not investigating their financial affairs.

Mr. Palmer: I don't want to, your Honor.

The Court: He may answer generally.

A. Well, as money came in to the credit of Ruth Donaldson it was credited to her account. We didn't turn it over to her regularly or anything of that kind. When she called for money and we had it, we gave it to her. If she didn't and there was an accumulation there, we bought bonds as a rule. Occasionally we bought mortgages. Once in a while we would buy a mortgage that was a pretty good size. We [fol. 290] would give it to two or three girls, two or three sisters, but bonds were always bought, just one, individual would own a bond if it were purchased.

Q. Was your father the manager of this arrangement or this joint arrangement of property in 1929?

A. Well, he originated it.

Q. And was he the manager and director, the one who made the ultimate decision with regard to investments in 1929?

A. Well, I think I probably did.

Q. How long did this way of doing business continue after 1929?

A. Well, it still continues.

Q. It continues and notwithstanding the formation and organization of a corporation?

A. That is right.

Q. Is the business of the corporation separate from that of the——

A. The Chase Investment Company is just the managing and operating corporation. It owns no property. It just manages property owned by the brothers and sisters. My father had since passed away.

The Court: Do you have an extended cross examination? Will it take some little time?

Mr. Palmer: I would like to look at the photostatic copies of what the book states.

The Court: We will recess until 9:30 in the morning.

[fol. 291] (At this time recess was taken until 9:30 o'clock A. M., May 11, 1939.)

May 11, 1939, 9:30 A. M.

ELBRIDGE CHASE, recalled on behalf of plaintiff, for further cross examination, testified:

By Mr. Palmer:

Q. Mr. Chase, when we adjourned yesterday we were inquiring about the nature of the interest which your sister Mrs. Donaldson had in the Chase Investment Company. Now, her interest in the company, and the manner and method of handling her interest, was this: As a member of the Chase family she had a certain share in certain real estate, investments which were largely real estate; as the real estate earned an income her share of that income would be credited to her account on the books?

A. That is right.

Q. Then as earnings were shown upon the books the Chase Investment Company might invest some part of that earnings, or all of it, depending upon her wishes, in a bond or some such similar type of investment?

A. Yes.

Q. Is that just about the nature and form that her investment took and the way that her investment matters were handled by the Chase Investment Company?

A. That is right, excepting that we didn't depend upon her wishes entirely, only to the extent of any accumulation [fol. 292] over and above what she drew for personal expenses we invested without her knowledge and consent most of the time.

Q. Now, you have produced, or I should say Mrs. Donaldson produced yesterday in response to our notice to produce some books, and by stipulation of counsel it was agreed that photostatic copies of certain pages of the books covering 1929, 1928, 1927 and 1926 would be brought into court this morning. You have those before you there, do you not, Mr. Chase?

A. Yes.

Q. Calling your attention to Defendant's Exhibit 9, I will ask you if that is a sheet taken from the books of the Chase Investment Company, and if that is the page dealing with the account of Ruth Chase Donaldson, your sister?

A. Yes, it is.

Q. Are these books kept under your supervision?

A. Yes.

Q. And are the entries therein contained true and correct?

A. Yes.

Q. In the right-hand column, the column identified as the credit column, there appears the income derived from your sister Ruth's shares in her holdings of the Chase family property; is that true?

Mr. Streissguth: Before we go into this matter, your Honor, I call the court's attention to the fact it was not inquired into in direct examination, and it is not properly [fol. 293] cross examination. I object to it on that ground.

Mr. Palmer: As I recall the direct examination, there was some considerable testimony about the nature of the form of the investment which Mrs. Donaldson's connection with the company took; and there was also some testimony with respect to how her investment matters were handled. There was some description as to what the nature and character of the Chase Investment Company was. Now, having produced the books in response to our notice to produce, I believe I am within the scope of the direct examination to inquire in detail and specifically as to just what her interest in the Investment Company consisted. It seems to me this is simply in amplification of what has been testified to in generalties in the direct examination.

Mr. Streissguth: May it please the court, I have the record here. There was some reference in his direct examination to the Chase Investment Company for the purpose merely and as preliminary to the introduction of this Exhibit A-1, which was the check in payment of the Chase stock. There was no reference to the record here nor any discussion or questioning as to the investments that were made for Mrs. Donaldson. The only reference to the Chase Investment Company was for the purpose of showing the connection of this check. It is strictly not cross examination.

The Court: The purpose of this, I suppose, is to show the business experience.

Mr. Palmer: The business experience, and particularly [fol. 294] the investment experience of the plaintiff. Now, as to the materiality of this in question, I would like to explain to the court——

Mr. Streissguth: Not the materiality. I am not objecting on that ground.

Mr. Palmer: My purpose is upon the issue of her investment experience, and that of course has a bearing upon the issue of discovery and laches, and the issue of whether or not she relied on this so-called fraud.

Mr. Streissguth: In view of counsel's statement, I will add the objection it is immaterial and doesn't go to a defense.

Mr. Palmer: If the court please, I would like to make my position clear as to the materiality of this. I prefer to do so by stepping up to the bench, if the court will permit us to. I do that because I believe that the course of my examination may be impaired if the witness is informed as to what course it is going to take.

The Court: I think I will overrule the objection and let you go into that. It is a court case, and the court wants the entire picture.

Mr. Streissguth: May it be understood, then, that all of the examination in reference to those records is subject to our objection?

The Court: The record may show that.

Q. Now, referring to the right-hand column, or the credit column of Exhibit No. 9, there is shown as a first item a balance of $2,022.97?

A. That is correct.

Q. Brought forward?

[fol. 295] A. Right.

Q. That represents income due to your sister from a previous year's accumulation, doesn't it?

A. Well, previous year and up to February 9, 1929.

Q. Yes. The next item in that same column represents income earned by the security described as one Northern Ohio 6-30, one Sugar Oreinte 7-35, one Finland 7-35?

A. That is correct; but it is interest, not income.

Q. That is, interest earned by the securities described in that item?

A. That is right.

Q. And which have been credited to her account?

A. That is right.

Q. The next item under date of April 5, 1929, represents earnings or income to her from 1/8 rents from Haverhill Mar; what does that stand for?

A. March income.

Q. 200?

A. Right.

Q. The next item under the same date represents income due on 1/6 rents Chelsea, March 200?

A. Right.

Q. The next item dated May 1st likewise represents income due her on money rents from Haverhill, April 150?

Mr. Streissguth: Now, your Honor, if counsel is going to read each of these items separately, I object to that for [fol. 296] the reason that it is prolonging the trial unnecessarily. I have no objection to offering the exhibit in view of the court's ruling subject to my objection that it is not material or cross examination. I see no purpose in going right down one entry after another, when the entry speaks for itself.

Mr. Palmer: This is just preliminary, your Honor. I think very shortly we can shorten this thing up considerably. I just want to bring out what this column represents and what the various items stand for.

Mr. Streissguth: It speaks for itself, John.

Mr. Palmer: I don't think it does at all, Mr. Streissguth.

Mr. Streissguth: I make my objection on this ground, that it is not the best evidence, that the character of the exhibit has already been fully explained by the witness, and that the questions in this form without the introduction of the exhibit itself, in view of the preliminary testimony, is incompetent, irrelevant and immaterial. I am merely seeking to hurry this up.

The Court: Do you expect to go down through each item?

Mr. Palmer: No, I am not going to take him down each item, but I do want to take up certain of these items to show just what they represent and how they are entered.

The Court: Shouldn't the exhibit be in evidence?

Mr. Palmer: Well, I thought that I would introduce those [fol. 297] parts of the exhibit which deal with securities after I have fully identified just how the item is entered. We will offer the entire exhibit in evidence.

The Court: I don't see that it is necessary to go down through each item, of course. Go ahead. You may proceed.

Mr. Palmer: Defendant offers in evidence Defendant's Exhibit 9, which has been identified as a page taken from the books of the Chase Investment Company dealing with the account of Ruth Chase Donaldson for the period of 1929.

Mr. Streissguth: We have no objection except that it is not proper cross examination. We see no materiality to it.

The Court: Received.

Q. In the right-hand column appear the names of certain bonds, preferred stocks, and similar intangible securities, isn't that true?

A. Yes, excepting no preferred stocks that I see.

Q. The security appearing in this column, or securities appearing in this column would be posted, or they would appear in the event that it earned interest or some other form of income?

A. That is correct, or in case there was a sale made.

Q. Or in case of a sale?

A. That is right.

Q. If it so happened that the security did not earn income for the year 1929 it would not appear in the right-hand column?

[fol. 298] A. It would not.

Q. If there was no sale of an inactive security for the year 1929, inactive in the sense that it wasn't earning anything, it likewise would not appear in the right-hand column, would it?

A. Any sale would appear whether it was an inactive or active security.

Q. That isn't quite my question. My point is if there was no income earned and if there was no sale of an inactive security in 1929 it would not appear in the right-hand column, would it?

A. No.

Q. Therefore, the right-hand column would not represent or show all of her holdings of bonds or some such similar type of intangible security for the year 1929, would it?

A. This isn't a list of her holdings. This is a list of her income.

Q. That is a list of her income?

A. Right.

Q. And it doesn't purport to be a list of her holdings of securities in the year 1929?

A. No.

Q. Now take the left-hand column. That shows the disposition which has been made of the income which her property has earned?

A. That is correct.

Q. Where that income has been invested in a bond or some such similar type of security, that is, where such a security has been bought for her account, it would appear in the left-hand column?

A. That is correct.

[fol. 299] Q. This column shows, then, only those securities which were bought for her account in the year 1929 by the Investment Company?

A. From March 20th to November 14, 1929, yes.

Q. During the period shown on the sheet?

A. That is right.

Q. And you say that is from March 20th to November 14th?

A. 1929, right.

Q. Were all of the securities bought for her account in 1929 and entered here in the left-hand column delivered to her, or was the custody retained by the Chase Investment Company?

A. They were not delivered to her until many years later, if she still retained them—or we still retained them in her account, retained them for her.

Q. The entries in the left-hand column do not purport to show, then, what her holdings were of securities or all of her holdings of securities in 1929, do they?

A. No.

Q. Do you have another record showing what securities she held in 1929, all of the securities which she owned and held?

Mr. Streissguth: That is objected to as not proper cross examination.

The Court: I think I will sustain the objection. I think that should be brought out as a part of your case.

Mr. Palmer: If the court please, I don't want to take the time of the court unduly, but I would like to understand

[fol. 300] whether the ruling is made because of lack of materiality, or improper cross examination.

The Court: I think it is improper cross examination.

Q. Do you have a sheet taken from the books of the Chase Investment Company covering generally the year 1928?

A. Yes.

Q. Calling your attention to Defendant's Exhibit 10, I will ask you if that is a sheet taken from the books of the Chase Investment Company.

A. Yes.

Q. What period of time does it cover?

A. December 1, 1927, to and including February 9, 1929. It takes in the whole year of 1928.

Q. In this sheet there is shown in the right-hand column, as in the case of Exhibit 9, the credit column or the income which is due to Mrs. Donaldson?

A. That is right.

Q. In the left-hand column is shown the debits or the disposition made of her income?

A. That is right.

Q. Where the name of a security in the form of a bond appears upon this sheet it represents a security which was bought for her account at some time by the Chase Investment Company?

Mr. Streissguth: Objected to as repetition, self evident and immaterial. The record speaks for itself.

The Court: Overruled. He may answer.

[fol. 301] A. In the left-hand column, yes.

Q. The left-hand column represents a security as bought from a period commencing December 7, 1927, down to February 9, 1929?

A. Down to and including February 9th. You didn't say February 9th, there, did you?

Q. February 9, 1929.

A. Yes, that is correct.

Q. However, the right-hand column would reflect the name of a security which had previously been purchased by the Chase Investment Company for her account, and which earned interest or dividends or some other such form of income?

Mr. Streissguth: No dividends showing there, are there?

Mr. Palmer: I haven't had a chance to examine.

A. The answer is yes, excepting that it would also include a sale of a security.

Mr. Streissguth: Any dividends showing there?

The Witness: I don't see any.

Q. Does this right-hand column reflect the sale of any security for her account?

A. Yes.

Q. You are right. It reflects a sale of one Kingdom of Belgium under date of November 5, 1928; that is correct, isn't it?

A. Yes. It also shows income from real property and mortgages.

Mr. Palmer: We offer in evidence Defendant's Exhibit 10.

Mr. Streissguth: Objected to as not cross-examination, [fol. 302] not material, and as too remote. Not material in point of time.

The Court: I will receive it.

Q. Do you have a sheet taken from the records of the Chase Investment Company covering the year 1926, or the period 1926 largely?

A. Yes, both sides of this sheet.

Q. Calling your attention to Defendant's Exhibit 11, I will ask you if that is a sheet taken from the records of the Chase Investment Company, covering the account of Ruth Donaldson, the plaintiff here, for the period commencing at what time and ending at what time, Mr. Chase?

A. Well, November 14, 1924, to December 1, 1927.

Q. The entries upon this exhibit were made in accordance with the same general system that was pursued in the case of Defendant's Exhibits 9 and 10?

A. That is correct.

Q. As I understand you, the chronological period covered here in this sheet is a period commencing November 14, 1924?

A. Correct.

Q. And ending December 1, 1927?

A. That is right.

Q. So that this ties in with the prior exhibits as the immediate predecessor in the records to Exhibits 9 and 10, so that we get a continuous story?

A. From November 14, 1924, to and including November 14, 1929.

Q. Yes. So that there is no gap in the records here?
[fol. 303] A. No.

Q. Now, just as in the case of Defendant's Exhibits 9 and 10, the right-hand column is the credit column which represents the income credited to the account of the plaintiff, and the left-hand column represents the disposition of that income either to her or for her?

A. That is right.

Mr. Palmer: We offer in evidence Defendant's Exhibit 11.

Mr. Streissguth: Objected to as incompetent, irrelevant, immaterial, too remote, and not proper cross-examination.

The Court: It will be received.

Re-direct examination.

By Mr. Streissguth:

Q. I omitted to ask Mr. Chase this question. State whether or not in April, 1929, you yourself purchased some of these Chase units, so-called, at Minneapolis.

Mr. Palmer: I shall object to that, your Honor, as immaterial.

Mr. Streissguth: For the purpose of showing repeated and successive sales in violation of the statute.

Mr. Palmer: I shall object, then, further on the ground that it is not proper re-direct.

The Court: Overruled. You may answer.

A. Well, I bought Chase stock, but I don't know when. I can't tell you just what date.

Q. Well, during 1929?

[fol. 304] A. I think it was.

Q. On how many different occasions?

Mr. Palmer: May it be understood that the same objection stands to this line of examination?

The Court: Yes, that may be understood.

Q. How many blocks?

A. Well, I bought the stock before it was split up. I think I bought a couple of times in order to even it up to a certain number of shares. I think I bought about eight shares to begin with. That was split about five to one or seven to one.

Q. Five to one, that is correct.

A. And in order to even it up to sixty shares I bought some additional stock. I think I got some rights, too, if I am not mistaken.

Recross-examination.

By Mr. Palmer:

Q. Did your sister call you or ask for your advice before she bought the eight shares which form the subject of this action?

A. No.

Q. Did you know anything about it before you were asked to draw the check to pay for it?

A. No. We were in the habit of buying the securities for all our sisters, including Mrs. Donaldson. She didn't know what we were buying at all. Up to 1929 I don't think she had any idea of what securities we held for her.

Q. Did you buy National City stock at about the time you bought the Chase Bank Stock?

[fol. 305] Mr. Streissguth: That is objected to as immaterial.

The Court: I think I will sustain the objection. I don't see the materiality.

Q. In 1929 your brother Chauncey Chase was employed by the National City Company, was he not?

Mr. Streissguth: Objected to as immaterial and not cross-examination.

Objection sustained.

Mr. Streissguth: Now, your Honor, we would like to go down the line on our notice to produce and clear up some of the documentary matters. We would like to have counsel produce, if he will, the so-called Chase deposit agreement, item No. 1. (Mr. Palmer produces paper.) Pursuant to our demand, counsel has produced Plaintiff's Exhibit A-6, being the so-called Chase deposit agreement of March 21, 1917. We offer it in evidence.

Mr. Palmer: No objection, your Honor.

The Court: Received.

Mr. Streissguth: Before I forget it, I want to offer at this time the Ruth Chase Donaldson affidavit, which I believe is marked Defendant's Exhibit 6, and referred to in

her cross-examination yesterday. We offer it as part of the re-direct of Mrs. Donaldson, the Defendant's Exhibit 6 being the affidavit referred to in her cross-examination.

Received without objection.

Mr. Streissguth: Now I ask you to produce any amendments to the so-called 1917 agreement.

Mr. Palmer: That is item No. 2.

[fol. 306] Mr. Streissguth: Yes. Counsel has produced, pursuant to notice to produce, an agreement dated January 15, 1930, which I will now have marked Plaintiff's Exhibit A-7. This incorporates all the provisions in effect of the agreement dated March 21, 1917, as amended; is that correct, counsel?

Mr. Palmer: Yes, that apparently is what it does, according to the printed copy. It incorporates not only the amendments, or the amendment of January 15, 1930, but the previous and intervening amendments between the time of the first agreement and the amendment of January 15, 1930.

Mr. Streissguth: We offer Plaintiff's Exhibit A-7 in evidence.

Received without objection.

Mr. Streissguth: This, by way of explanation, is the agreement that changes the form of certificate from a Bankers Trust Company certificate to a duplex certificate, and eliminates the Bankers Trust.

I will ask you to produce, pursuant to notice, the list of sales made through the Minneapolis office of the Chase Securities Corporation during 1929.

Mr. Palmer: I am informed that there is no such record. The sales were made and consummated at Chicago, and in order to comply with this it would be necessary for us to bring down such records as the company now has stored away in its vaults; and to go through all of our records and try to pick out those people who lived in Minnesota from those who lived elsewhere at the time is too burdensome [fol. 307] for us to even attempt.

Mr. Streissguth: May it please the court, Miss Chapman's testimony and the record now shows that the Minneapolis office kept individual records of the customers residing in Minneapolis who purchased this stock through the Minneapolis office. It is these record cards of residents of

Minnesota that I am now asking for and that the notice to produce refers to. Those are the ones I ask you to produce. There is nothing burdensome about that.

Mr. Palmer: If the court please, it would be just exactly as burdensome as I have said to go through the records of all the purchasers of Chase stock. I am informed that it is necessary to go through all of the files in order to pick out those who happened to be residents of the state of Minnesota, and that there is no segregation of the Minnesota purchasers from the purchasers in any other part of the country. We haven't got the records of all the Minnesota purchasers. We have the records which pertain to the Minnesota purchaser who was involved in this case. Now, I don't see what material issue it would have any bearing on. Furthermore, because it already has been shown, I believe, that this was not an isolated sale, that it was a sale made in the course of a good many.

The Court: The testimony of Miss Chapman was that there were something like five hundred similar sales.

Mr. Streissguth: It is on the same issue we want these records. In view of counsel's admission it may not be neces- [fol. 308] sary to pursue that matter.

Mr. Palmer: I don't believe I have made any admission. I believe the testimony here is the thing that speaks for itself.

Mr. Streissguth: Well, that is what I wanted it for, your Honor. I would like to have you produce the application for license and any records you have in reference to license of one Weir Jepson, your agent, and also under No. 7 all applications for your agents' licenses, and your application for broker's license during the year 1929. (Mr. Palmer produces.) Have you any license or application for license of Weir Jepson for Minnesota?

Mr. Palmer: I don't have any, Mr. Streissguth.

Mr. Streissguth: You cannot produce it?

Mr. Palmer: I don't know that there ever was such license issued. According to what the Commissioner of Securities has told me there never was such license issued.

Mr. Streissguth: But you have here the Iowa license?

Mr. Palmer: I have several papers there.

Mr. Streissguth: These are photostats. We will offer those in lieu of the originals under our general understanding.

Mr. Palmer: Yes. I don't have the original. The original has not been supplied.

Mr. Streissguth: Do you mean New York sent you photostats?

Mr. Palmer: I was sent a photostatic copy. I assume that it is a correct and true representation of the original docu-
[fol. 309] ment.

Mr. Streissguth: Very well. We now offer at this time Plaintiff's Exhibit A-9, being appointment of Weir A. Jepson as agent of the Chase Securities Corporation within the state of Iowa, and Plaintiff's Exhibit A-8 is the dealer's permit issued to Chase Securities Corporation by the state of Iowa, both of which documents were produced by the defendant pursuant to notice.

Mr. Palmer: If the court please, I wish to have it clearly understood that I am in no position to identify or lay a foundation for the introduction in evidence of the exhibits produced. The foundation for the introduction of various exhibits produced must be laid in the usual and customary way, notwithstanding the fact that response was made to the notice to produce. I have tried to respond by producing that which nearest resembles what the plaintiff has called for. If the plaintiff wishes to prove his case in the accepted fashion he should take depositions, as he well could, as this case has been pending for a considerable time. However, I am not making any objection to the introduction of this particular exhibit, and I therefore have no objection to its being offered in evidence.

The Court: Received.

Mr. Streissguth: Now, under paragraph 9, Mr. Palmer, I want letters received by the Chase Securities Corporation from the plaintiff, and correspondence, printed matter, addressed and sent to her from 1929 to 1937. I am particu-
[fol. 310] larly interested in these requests from the Chase Securities Corporation that the stockholders, including the plaintiff, convert their securities in 1930, and again in 1936, into securities of a different form.

Mr. Palmer: Mr. Streissguth, I have produced most of the papers which you have called for under that item. However, I have a folder here. I believe that there are a few papers left in my folder. I will be glad to produce them.

Mr. Streissguth: You remember my referring yesterday to printed instructions from the Bank and Securities Corporation.

Mr. Palmer: Mr. Streissguth, you are welcome to that folder. The matter which Mr. Streissguth has referred to appears to be a printed circular which is addressed generally to the shareholders of the Chase National Bank and Chase Securities Corporation. It is a printed circular of such character that I probably would not have it in the correspondence file which relates to correspondence with the plaintiff in this action, but I will try and secure this document for him.

Mr. Streissguth: That is satisfactory. Now, counsel has produced, pursuant to paragraph 9 of our notice to produce, the correspondence file relating to the purchase of stock by Mrs. Donaldson. Does this refer to Frank or to Mrs. Donaldson?

Mr. Palmer: It appears to refer to F. A. Donaldson, and I assume that refers to her husband. But probably was misfiled. I might say for the record that with respect to the receipt of the instrument that Mr. Streissguth just asked [fol. 311] me about, it appears to have been something pertaining to F. A. Donaldson, and apparently was misfiled.

Mr. Streissguth: Plaintiff's Exhibit A-10 is a registered mail receipt dated August 16, 1929, which has been produced by the defendant, pursuant to notice; and Plaintiff's Exhibit A-11 is a report apparently from the First National Bank of Minneapolis, dated 8-16-29, reporting the collection of $1,828, less a fee of $1.85, also produced by the defendant pursuant to notice. They are now offered in evidence. They relate to this original purchase.

Mr. Palmer: I have no objection to these exhibits, but I would like to have counsel stipulate that the $1.85 deduction here represents the charge of the collection department of the First National Bank, and not a charge of any commission of the Chase Securities Corporation.

Mr. Streissguth: It is the bank's charge for collecting the $1,828.

Mr. Palmer: The First National Bank.

Mr. Streissguth: That is right; and deducted from the remittance.

Mr. Palmer: Deducted from the remittance.

Mr. Streissguth: In other words, it has nothing to do with the so-called commission on the sale of the stock.

Mr. Palmer: That is right.

Mr. Streissguth: It is a collection charge made by the bank and charged to the Chase Securities Corporation.

Mr. Palmer: Correct.

The Court: As testified to by the cashier of the bank. [fol. 312] Received.

Mr. Streissguth: Yes. Plaintiff's Exhibit A-12, a letter from the Donaldson Company to the Amerex Holding Corporation, dated July 28, 1936, referring to the conversion of the stock certificates into new certificates, is offered in evidence. That has also been produced by the defendant pursuant to notice.

Mr. Palmer: I have no particular objection to this. I don't think it has any particular material bearing on the case, however, but I have no objection.

The Court: Received.

Mr. Palmer: May it be understood, Mr. Streissguth, that photostatic copies be substituted?

Mr. Streissguth: Correct. Now, Mr. Donaldson's letter just identified refers to a notice of July 24, 1936, regarding exchanging certificates. Will you produce a copy of such notice that was forwarded to Mr. and Mrs. Donaldson?

Mr. Palmer: I don't find such notice in my file, Mr. Streissguth, but I will see if further search will show that I have such document.

Mr. Streissguth: Then, we offer the following instruments, which have all been produced by the defendant pursuant to notice, carbon copy of letter dated February 7, 1930, from the Chase Securities Corporation to Mr. Frank Donaldson, marked Plaintiff's Exhibit A-15 and Plaintiff's Exhibit A-14, the registered mail receipt attached to Exhibit A-15. They are both offered.

Mr. Palmer: There is no objection to that, your Honor, [fol. 313] Plaintiff's Exhibits A-15 and A-14.

Mr. Streissguth: While we are at it, Plaintiff's Exhibit A-13, your Honor, is offered. That is a letter from the Chase Securities Corporation to the Donaldson Company, referring to Mrs. Donaldson's stock, dated July 30, 1936.

Mr. Palmer: The defendant has no objection to this offer.

The Court: Received.

Mr. Streissguth: Plaintiff's Exhibit A-16, letter from Frank Donaldson to Chase Securities Corporation, Minneapolis, dated October 10, 1929, requesting a conversion of the street certificates into a certificate in the name of Ruth Chase Donaldson.

Received without objection.

Mr. Streissguth: Plaintiff's Exhibit A-17, a letter from Chase Securities Corporation to Mrs. Ruth Chase Donaldson, dated January 31, 1930, referring to a cash dividend and the conversion of stock into her name, is offered in evidence.

Mr. Palmer: No objection. I might say at this point that I believe that the record shows that there was a dividend of one dollar which was not paid upon her stock, dividend stock. You see she got eight shares of stock, which was followed on August 23, 1929, by a one-share stock dividend, and the dividend record which we inquired into yesterday did not reveal this one dollar. This letter shows that there was an adjustment made and that she got the one dollar. May it be so stipulated that she received and cashed the one dollar dividend which is referred to in this letter?

[fol. 314] Mr. Streissguth: Yes, but you say it is not a duplicate of one of the checks? It is enclosing a check.

Mr. Palmer: I understood that one of the checks was missing.

Mr. Streissguth: If it is, this may be accepted as proof of the payment of an additional dollar.

Mr. Palmer: If it is missing.

Mr. Streissguth: If it is not a duplicate of one of those that has been offered in evidence.

Mr. Palmer: That is all I wanted, Mr. Streissguth.

The Court: Received.

Mr. Streissguth: All right. Plaintiff's Exhibit A-18 is a proxy, consent and power of attorney, dated March 24, 1930, in reference to conversion of stock into this new form.

Mr. Palmer: We have no objection to Plaintiff's Exhibit A-18. May it be stipulated that this proxy, consent and power of attorney was received and signed by Ruth Chase Donaldson, and returned to the Chase Bank and Chase Securities Corporation?

Mr. Streissguth: At their request.

Mr. Palmer: Well, I don't know at whose request. This proxy, consent and power of attorney is sent out. All I want is your stipulation that her signature appears upon it, and that she received it and sent it in.

Mr. Streissguth: Received it from whom?

Mr. Palmer: I suppose she received it from the Corporation.

[fol. 315] Mr. Streissguth: With that understanding it may be admitted that she signed it and sent it in. Now,

John, will you produce certificate No. F-181004, registered in the name of George Stotz, Junior, being the one-share dividend street certificate?

The Court: The Exhibit A-18 is received.

(A short recess.)

Mr. Streissguth: Mr. Palmer, the reporter has received from Mr. Hayes, the Deputy Commissioner, a certified copy of Plaintiff's Exhibit E, the 1930 application. You were to supply photostats of the material pages of the annual report which is attached to and made a part of this application, do you remember?

Mr. Palmer: I remember that.

Mr. Streissguth: Have you it with you?

Mr. Palmer: I have got them at the office. I forgot to bring them with me.

Mr. Streissguth: Plaintiff's Exhibit E, I think, has already been offered and received. I will ask counsel if he will kindly bring the additional exhibits.

Mr. Palmer: I certainly will.

Mr. Streissguth: Plaintiff's Exhibit A-19, produced by the defendant, your Honor, pursuant to notice, is an agent's license issued to Weir A. Jepson by the state of Iowa. It is offered in evidence.

Mr. Palmer: No objection, your Honor. I would like to have it understood that this offer just made is apparently a card which the salesman licensed by the Iowa Commission [fol. 316] apparently carries with him.

The Court: Received.

Mr. Palmer: If the court please, as a part of this application to the Iowa Commission I find that there is a photostatic copy of a statement of prior occupation and business experience of representative or agent. This makes up apparently part of the application for license issued to the salesmen in Iowa, and I assume that counsel has overlooked offering it along with the other papers.

Mr. Streissguth: I will have it marked.

Mr. Palmer: I want to object to the exhibit pertaining to the Iowa license if the whole thing isn't offered. Object to it on the ground that it is incomplete.

Mr. Streissguth: Well, I want it complete, Mr. Palmer. I assumed that you were giving me everything. If there is anything missing I certainly want it offered.

Mr. Palmer: Do you offer it, then?

Mr. Streissguth: Certainly.

The Court: That will be Plaintiff's Exhibit A-20.

Mr. Streissguth: I don't presume you have the articles of incorporation of the bank?

Mr. Palmer: No, I don't. I would like to stipulate with you, like I did in another case.

Mr. Streissguth: We will be glad to have you stipulate.

The Court: I understand Plaintiff's Exhibit A-20 is offered without objection.

[fol. 317] Mr. Palmer: That is right, your Honor.

The Court: Plaintiff's Exhibit A-20 is received.

Mr. Streissguth: In reference to the incorporation of the Chase National Bank, Mr. Palmer, I will stipulate.

Mr. Palmer: May we reserve that stipulation until I can review my file and get the facts accurately in mind?

Mr. Streissguth: It can be stipulated subject to further qualification, if you wish, that the Chase National Bank was a national banking association at all times involved in this action. If you want to qualify it further, you may. I think you admit that in your answer, in any event.

Mr. Palmer: That is true, we allege that at all times material the Chase National Bank was a national banking association organized under the banking laws of the United States of America.

Mr. Streissguth: We will admit that.

Mr. Palmer: We would also like to have it stipulated for the purposes of the record that on August 12, 1929, the capital of the Chase National Bank was $80,000,000, divided into 4,000,000 shares of stock of the par value of $20 per share.

Mr. Streissguth: It may be so stipulated.

Mr. Palmer: May it also be stipulated that on August 24, 1929, the capital of the Chase Bank, the correct name of which is the Chase National Bank of the City of New York, was increased to $105,000,000, divided into capital shares of 5,250,000. This represented a change on August 24, 1929, by increase in the capitalization of the bank by 1,250,000 [fol. 318] additional shares of the par value of $20 each.

Mr. Streissguth: Rather than admit it in that form, Mr. Palmer, we will accept a compilation of the complete statement of the capital structure of the two institutions during the period commencing 1929 and ending at the time of the commencement of this action. We will accept your analysis of the statement as true and correct.

Mr. Palmer: And will you accept that the analysis represents the changes in the corporate structure which it purports to represent?

Mr. Streissguth: Yes. And you will supply us with a copy of the capital structure of the two institutions?

Mr. Palmer: I will supply you with that compilation similar to that which has been supplied before.

Mr. Streissguth: Yes. Now I ask you to produce under paragraph 11 the articles of incorporation of the Chase Securities Corporation, together with amendments. (Mr. Palmer produces.) Plaintiff's Exhibit A-21, produced by the defendant pursuant to notice, is a certificate of incorporation of the Chase Securities Corporation and all amendments thereto. We now offer it in evidence.

Received without objection.

Mr. Streissguth: Have you the application of the Chase Securities Corporation for a license as a foreign corporation, filed with the Secretary of State, and also the certificate and resolution of withdrawal from the state? (Mr. [fol. 319] Palmer produces.) Now, counsel, in your answer you allege that either in 1930 or 1931 the Chase Securities Corporation made application for license as a foreign corporation. I will stipulate with you as to the date.

Mr. Palmer: It is stipulated that the defendant was licensed and authorized to transact business as a foreign corporation on June 5, 1930, under Sections 7493-7495 of Mason's Minnesota Statutes, 1927. It is further stipulated that on June 30, 1931, defendant pursuant to Section 7494, of Mason's Minnesota Statutes, 1927, did withdraw from Minnesota, revoke the appointment of its agent in this state, and did appoint the Secretary of State of Minnesota its agent to receive legal process in any action or proceeding of any kind arising out of or involving anything done or omitted by said defendant in the state of Minnesota while licensed to do business therein.

Mr. Streissguth: That may be so stipulated. Plaintiff's Exhibit A-22 is a certified copy, certified to by Mike Holm, Secretary of State, of the resolution of withdrawal, dated June 27, 1931, filed in the office of the Secretary of State of Minnesota. The entire exhibit is offered in evidence.

Received without objection.

Mr. Streissguth: Plaintiff's Exhibit A-23 is the certificate from Mike Holm, Secretary of State, as to the date of with-

drawal being the 30th day of June, 1931. That is offered in evidence.

Received without objection.

Mr. Streissguth: Now, I believe we will have the order of cancellation from the Securities Commission? You have a [fol. 320] copy of the original of that order, under item 13.

Mr. Palmer: I don't have the original, Mr. Streissguth. I presume that the original is on file with the Commissioner of Securities and forms a part of his records. However, I do have a copy. (Producing.)

Mr. Streissguth: Plaintiff's Exhibit A-24, a photostatic copy of the order cancelling the broker's license dated July 7, 1931, is offered in evidence.

Received without objection.

Mr. Streissguth: Under item No. 16 we request a list of the stockholders of the Chase Securities Corporation within the state of Minnesota, on the dates therein specified, January 1, 1928; January 1, 1929; and August 12, 1929.

Mr. Palmer: I have no such record, and I am informed that there never has been such a record.

Mr. Streissguth: You cannot furnish it?

Mr. Palmer: I cannot furnish you with such a record. I cannot produce such a record.

Mr. Streissguth: Under item 18 we request a letter dated September 21, 1927, addressed to Blair & Company by the Metpotan Securities Company, the so-called 1927 pool.

Mr. Palmer: If the court please, in endeavoring to comply with the notice to produce I have here what appears to be a photostatic copy of the thing called for in the notice to produce. It is perfectly apparent that this is a record of some kind of the Metpotan Securities Corporation. It is not [fol. 321] a record of the defendant. We therefore cannot vouch for this document in any way, nor can we in any way lay a foundation for the introduction of the instrument into evidence. Now, I am aware that it has not yet been offered, and I will make my objection at the proper time.

Mr. Streissguth: Will you admit that the Metpotan Corporation is wholly owned and at all times been a wholly owned subsidiary of the Chase Securities Corporation?

Mr. Palmer: I believe the evidence will so show in the course of the case. I prefer not to be bound by such an

admission. Even assuming that it is shown that the Metpotan Securities Corporation is a wholly owned subsidiary, nevertheless the defendant corporation is not therefore bound, nor can it be expected to produce the documents which belong to its wholly owned subsidiary. The parent of the wholly owned subsidiary cannot any more be expected to produce the documents of its subsidiary, or vouch for their authenticity, or in any way lay a foundation for them; they cannot any more be expected to do that than a parent can be expected to produce things that belong to its child and vouch of their authenticity.

Mr. Streissguth: I don't follow counsel's reasoning and analogy between parent and child. It may be close, but here we have a wholly owned corporate subsidiary producing at our request one of the letters in reference to a formation of a trading account and pool. We, as counsel has indicated, will follow this up with other evidence. We cannot offer all [fol. 322] our evidence at once, but this will be followed up with evidence showing this is the first of a series of three or four pools formed for trading in the so-called Chase units.

Mr. Palmer: If the court please, the defendant calls the court's attention to the fact that Plaintiff's Exhibit A-25 is a photostatic copy of what resembles the demand made in the notice to produce. Now, we haven't produced the original document, and we cannot be expected to. This obviously appears to be a record, and the record called for appears to be a record of the Metpotan Securities Corporation. We object to it, and we object to the offer on the ground that no foundation has been laid, on the ground that it is incompetent and hearsay. We make the further point, your Honor, that there has been no connection shown between the Metpotan Securities Corporation and the defendant corporation. There is no showing that the person who purportedly signed this letter had any connection with the defendant corporation. It is not shown that he was an officer or the agent of the defendant corporation, or that he was authorized to act for the defendant corporation in writing this letter. We further object on the ground that it is irrelevant to the issues in this case. At the outset of the case it was conceded that the plaintiff was relying upon a buyer-seller relationship. According to the complaint the only importance that this so-called trading account would have upon the issues would be upon the assumption of proof of

[fol. 323] a relationship of principal and agent, or broker and customer, and that the participation in this so-called trading account constituted a violation of this so-called fiduciary relationship between the parties. Where it is conceded that the relationship was that of buyer and seller, then the issue of trading accounts is out of the case, and there is no issue whatsoever upon which the trading accounts would have any bearing.

The Court: I suggest that I reserve my ruling until later.

Mr. Streissguth: I won't discuss, then, this proposition of pooling being an issue in this case. I am prepared to at this time, or shall I go on with the proof?

The Court: Perhaps we better take up the argument at a later time.

Mr. Streissguth: Will you produce the letter dated April 18, 1929, addressed to Potter & Company, with reference to the formation of the trading account on that day?

Mr. Palmer: If the court please, the defendant produces a photostatic copy of what appears to resemble the matter called for in item 19 of the notice to produce.

Mr. Streissguth: This bears an endorsement, your Honor, that it is from the file department of the Chase Corporation; is that correct, Mr. Palmer?

Mr. Palmer: I am informed that the marking on the exhibit, "File department of the Chase Securities Corporation," was a stamp used by the Committee on Banking and Currency at the time of the investigation in 1933, that this [fol. 324] stamp was used by the Committee for the purpose of differentiating between the Chase Corporation and the Chase Securities Corporation, and of documents from other sources which the Committee called for at the time. It is a Committee stamp and it is not the defendant's stamp, I am informed.

Mr. Streissguth: Mr. Palmer, the Chase Corporation, as you allege in your answer, is the successor in the change of name of the original Chase Securities Corporation?

Mr. Palmer: That is right. Anyhow, it was a stamp of differentiation which was used by the Committee at the time so that it could identify the instrument from others submitted to the Committee at the time of the investigation.

Mr. Streissguth: We will offer at this time Plaintiff's Exhibit A-26, a letter to Potter & Co., dated April 18, 1928,

apparently. This is the four-four pool, so-called. It is the second of a series of pools.

Mr. Palmer: I shall object to this offer on the ground that no foundation has been laid, and the ground that it is incompetent, hearsay, and no connection between the Metpotan Securities Corporation and the defendant corporation has been shown which in any way would sufficiently lay a foundation for the introduction of this particular offer. Furthermore, there is no showing who the person was who purportedly signed the letter, or that whoever did sign it was an officer of the defendant corporation, or that he was author-[fol. 325] ized to so act on behalf of the defendant corporation. I also object on the ground that it does not constitute a mode and form of proof which is usual and customary in the trial of actions at law; that the proper mode of procedure would be for the plaintiff to undertake to prove these matters by a deposition.

Mr. Streissguth: We state to the court that we expect to lay further foundation. We are not pressing the offer at this time.

The Court: I will make the same disposition.

Mr. Palmer: May it be understood that we have the same objection to all of these various offers made subsequent as to the entire line?

The Court: Yes, I don't think it is necessary to repeat the objection each time. It may be understood.

Mr. Palmer: Thank you.

Mr. Streissguth: Now, the Broomhall pool letter, dated April 10, 1929, under item 20.

Mr. Palmer: In response to the demand in item 20 I am producing what appears to be a photostatic copy of that which resembles the demand in item 20. I cannot in any way vouch for the matter produced in any further particular.

Mr. Streissguth: Will you state where the original is from which the photostat was made?

Mr. Palmer: I presume that it is in the records of the Metpotan Securities Corporation.

Mr. Streissguth: That is merely a presumption?

Mr. Palmer: That is merely a personal assumption on my part.

[fol. 326] Mr. Streissguth: Plaintiff's Exhibit A-27, produced by the defendant pursuant to paragraph 20 of notice

to produce, is a letter addressed to Broomhall, Killough & Co., dated April 10, 1929, and is now offered in evidence.

The Court: The same objection, I suppose?

Mr. Palmer: The same objection, your Honor.

The Court: It will be treated in the same way.

Mr. Streissguth: Now, the so-called Dominick & Dominick pool, July 19, 1929.

Mr. Palmer: If the court please, in response to item 21 I am producing what appears to be a photostatic copy of a letter which resembles the document called for in item 21 of the notice to produce. I cannot vouch for it any further.

Mr. Streissguth: This exhibit, your Honor, is addressed to the Chase Securities Corporation, and not to Metpotan, and I ask for the production of the original, not the photostat. It is addressed to the Chase Securities Corporation.

Mr. Palmer: I have responded by producing a photostatic copy, Mr. Streissguth.

Mr. Streissguth: And that is taken from the files of the Chase Securities Corporation, from the original, is it not?

Mr. Palmer: I am not prepared to lay a foundation, Mr. Streissguth.

Mr. Streissguth: Well, I ask you to produce the original in this instance rather than a photostat. I am now demanding the production of the original letter, and upon your fail-
[fol. 327] ure to produce the original I shall offer secondary proof in the form of this photostat.

Mr. Palmer: I so understand by the statement in the notice to produce. I have complied with your demand by producing a photostatic copy of what appears to correspond to the demand in your notice to produce.

Mr. Streissguth: Now, your Honor, this presents a different situation than the other exhibits. This letter is addressed to the Chase Securities Corporation, and the photostat is produced in lieu of the original, and in view of the refusal of the defendant to produce the original I offer the photostat produced as secondary evidence of its contents. This is not addressed to Metpotan, but is addressed to the Chase Securities Corporation, the defendant in this action, and is the particular pool which is involved in this lawsuit, and which was in existence at the time of this purchase by the plaintiff. Offer in evidence Plaintiff's Exhibit A-28.

Mr. Palmer: If the court please, I shall object to the offer on the ground that no foundation has been laid, that it is incompetent and hearsay. I also object to it on

the ground that it is not relevant to the issues in this case, and all of the reasons that I have previously advanced. I am not prepared to lay a foundation for this document either. I don't believe that any foundation is established by the response to notice to produce. I believe the authorities uniformly so hold.

The Court: I will take and rule upon all of them at the same time, if that is satisfactory.

[fol. 328] Mr. Streissguth: Very well. Now, on the other letters or agreements in reference to the establishment and formation of so-called trading accounts or pools to which the Chase Securities Corporation or its subsidiaries, the Metpotan Securities Corporation, or either of them were parties,

Mr. Palmer: If the court please, I have just received this file of photostatic copies through the mail. I would like to have an opportunity to look them over, to see what I have in my file before attempting to respond to this very broad and general demand in item 22.

The Court: We will take it up at 2 o'clock.

Recess until 2 P. M.,

May 11, 1939, 2 o'clock P. M.

Owen C. Devine, sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Streissguth:

Q. Mr. Devine, you live in St. Paul?
A. I do.
Q. And how were you employed in the year 1929?
A. By the Chase Securities Corporation.
Q. In what capacity?
A. District sales manager.
Q. Over what district?
A. Ninth Federal Reserve District.
Q. Including all of the territory in the Ninth Federal [fol. 329] District?
A. No, not all the territory, western Wisconsin, North and South Dakota, Montana, all of Minnesota.

Q. And where were your headquarters?

A. In 1929, Minneapolis.

Q. When did you start working for the Chase Securities Corporation?

A. In 1928.

Q. Do you remember the day and month?

A. I would say April 1st.

Q. Prior to that time had you been employed in a similar capacity by the National City Company?

A. I was.

Q. For how many years?

A. Fourteen.

Q. Did you have employed under you some salesmen?

A. I did.

Q. And were Maurice Angland and Mr. Barnes the two salesmen employed in the year 1929?

A. They were.

Q. And 1928, part of 1928? It doesn't matter, if you don't recall.

A. I believe I can substantiate that. I won't say positively when they entered our employ.

Q. Did you know a man by the name of Weir A. Jepson?

A. I did.

Q. And was he employed by the Chase Securities Corporation in 1929?

A. He was.

[fol. 330] Q. In what state?

A. Omaha, Nebraska.

Q. Sioux City, Iowa, his license reads.

A. That is right. Well, he was located in Sioux City, Iowa, but worked, I believe, under the Nebraska office.

Q. Here in evidence is an Iowa license issued to Mr. Jepson.

A. That is right.

Q. Does that refresh your recollection?

A. That is right.

Q. Then what do you say as to what state he was licensed in?

A. He was licensed in Iowa.

Q. Now, did Mr. Jepson during the year 1929 make any sales of the so-called Chase units, which is the combination of the Bank stock and the Securities Corporation stock, through the Minneapolis office?

A. He did.

Q. About how many?

A. Oh, I would say not very many, not over half a dozen.

Q. Now I am going to show you Exhibit Q which has been identified here as a record of the Chase Securities Corporation as salesman's sales order in the handwriting of Miss Chapman. Do you recognize that as one of the Minneapolis records?

A. That is right, it is.

Q. Does that refer to a sale to Ruth Chase Donaldson?

[fol. 331] A. It does.

Q. Of eight shares of stock?

A. It does.

Q. State whether or not you, yourself, ever knew or met Ruth Chase Donaldson.

A. I don't believe so. I know her by reputation. I wouldn't know her if she entered the room.

Q. Did you ever solicit her or have any business relations with her in reference to the purchase by her of any of the Chase units?

A. I did not.

Q. And referring particularly to the sale of eight units on or about August 10, 1929, represented by this order, did you personally have anything to do with that sale?

A. I did not, other than——

Q. Go ahead and qualify it.

A. Other than district sales manager of the office and having salesmen under my charge I probably signed that order and took credit for it myself to accommodate another salesman.

Q. And who did you accommodate?

A. Mr. Jepson.

Q. Who got the commission on that sale?

A. I did.

Q. What did you do with it?

A. Turned it over to Mr. Jepson.

Q. And where this Exhibit Q refers to the salesman as Devine, is that accurate?

A. Well, we—from the standpoint of records it is accurate. I took credit for the sale. I did not actually make the sale.

[fol. 332] Q. But you took credit for it, and who did you account to for the commission?

A. Mr. Jepson.

Q. And what was the commission?

A. Fifty cents a share.

Q. And again referring then to what is known as the security ticket, marked as Exhibit 3, your name appears in typewriting as Devine being the salesman. I will ask you whether it was the custom to get that information from the salesman's sales order? The one that I have just shown you.

A. Yes, this is a duplicate of that.

Q. The information is the same?

A. That is right.

Q. Now, here I show you Exhibit S, a record card in the name of Mrs. Ruth Chase Donaldson, showing a purchase by her of eight shares, and that your name and the name of Mr. Angland appears as the salesmen. Will you explain that?

A. Inasmuch as this sale was a matter of accommodation on my part as office manager and Mr. Jepson was not stationed in Minneapolis normally and that these were simply friends of his whom he importuned, it was natural for me to assign the further busines of this customer to one of my own salesmen and I assigned it to Mr. Angland.

Q. And Maurice Angland was one of your salesmen at that time?

A. He was.

Q. And did he have anything to do with the original sales [fol. 333] to Mrs. Donaldson of the eight shares?

A. He did not.

Q. Now, just one further question, about how many sales of these units would you say you made in Minnesota during the year 1929, roughly?

A. In value or in number?

Q. In number.

A. Number of sales?

Q. Of transactions.

A. Approximately 500.

Q. And were they scattered over the entire year from month to month?

A. They were.

Q. And do you have with you, if necessary, the records of those sales?

A. Not complete.

Q. Not complete, but partially?
A. Right.

Mr. Streissguth: You may inquire.

Cross-examination.

By Mr. Palmer:

Q. Now, with reference to Plaintiff's Exhibit Q, your name is the only one which appears upon that exhibit as salesman, is it not?
A. That is right.
Q. At that time you were the salesman for the Chase Securities Corporation or one of the salesmen?
A. I was the manager.
[fol. 334] Q. Yes. Did you sometimes solicit a sale of securities?
A. I did.
Q. And at that time was your title not that of representative of the Chase Securities Corporation?
A. It was representative, but—on this date, you mean?
Q. Yes, on that date. That was back in 1929.
A. August, 1929? I feel sure that I was district sales manager at that date, but I cannot say positively.
Q. I see. Now, you did occasionally solicit and receive an order for the stock of the Chase Bank and the Chase Securities Corporation?
A. I did.
Q. And why didn't you put Mr. Jepson's name up here in the corner of this sales order? He was the salesman you say who made the deal?
A. That is right. He was not connected with our office.
Q. Did you know anything about his being licensed or not with the Commissioner of Securities of the State of Minnesota?
A. Whether he was licensed in the state of Minnesota?
Q. Yes.
A. I did not nor did I inquire.
Q. Now, where Mr. Angland's name also appears upon the customer's credit card, why did you find it necessary to put Mr. Angland's name down on this slip also?
A. I didn't put it on that slip.
[fol. 335] Q. Well, the slips were made under your supervision and direction, weren't they?

A. Right.

Q. And I take it you were familiar with what was entered upon the slips, weren't you?

A. That is right.

Q. So you did know at or about this time that the name Angland was entered upon this slip?

A. I do.

Q. Did you ever tell anyone connected with the Chicago office that Mr. Jepson had any connection with this transaction?

A. I don't believe so.

Q. No. The only information that the Chicago office would have would be such information as you supplied them with on this sales order, isn't that correct?

A. That is right.

Q. Now, the Chicago office was the control office or the office under which the Minneapolis office operated, isn't that true?

A. That is correct, it, in turn, operated under the New York office.

Mr. Palmer: I move that the last response be stricken as not responsive to the question.

The Court: It may be stricken out as not responsive.

Q. Now, you first entered the employ of the Chase Securities Corporation in 1928, did you not?

A. I did.

Q. Will you tell us again the date which you say you first entered the employ of the company?

[fol. 336] A. I gave you an approximate date of April.

Q. April 1, 1928?

A. 1928.

Q. Now, how long did you remain in the employ of the Chase Securities Corporation?

A. Until July, 1932.

Mr. Streissguth: Now, Mr. Palmer, that company withdrew on July 1, 1931. You know that. The name was changed.

Q. Now, up to the time you left the employ of the company in 1932 you had been continuously employed by them, had you not?

A. By either the Chase Securities Corporation or its—under the new name of the Chase Harris Forbes Corporation.

Q. Right. Now, when the Chase Securities Corporation ceased its securities business actively in the state of Minnesota in 1931 you transferred your allegiance to the Chase Harris Forbes Company, did you not?

A. Yes—so far as I knew there was no change except on the letterheads.

Q. You continued right in the employ of the same physical office properties, at least?

A. That is right.

Q. And didn't you continue in the employ of the Chase Harris Forbes Company until it also ceased its active business of selling securities in Minnesota?

A. I did, or approximately within thirty days.

Q. Now, you have brought an action of your own against your former employer, the Chase Securities Corporation, to [fol. 337] recover upon purchases and sales of Chase stock which you made, isn't that true?

A. I have.

Q. This action of yours was commenced on or about March 11, 1938, wasn't it?

Mr. Streissguth: Objected to as immaterial. His interest is already shown.

Mr. Palmer: I think his interest in this matter can be shown, your Honor.

The Court: It already appears that he has an action.

Mr. Palmer: Yes, your Honor. I want to show just what the nature of the action is for the purpose of showing the type and therefore its bearing upon his interest in this case.

The Court: All right. He may answer.

Mr. Streissguth: We admit that he has brought an action of a similar type, if that is what you had in mind. I don't see how it is any further impeachment.

Q. And that action is still pending in the Federal Court of this state, is it not?

A. It is.

Mr. Palmer: Now, with Mr. Streissguth's admission that will be the only examination we make.

Redirect examination.

By Mr. Streissguth:

Q. Mr. Devine, you spoke about the Chase Harris Forbes Corporation. The records here show that the change was made from the Chase Securities Corporation to Chase Harris Forbes on or about July 1, 1931. That is correct, is it?

Mr. Palmer: I didn't hear you?

Mr. Streissguth: July 1, 1931.

Mr. Palmer: I didn't hear the first part of the question.

Mr. Streissguth: That is when the change was made to the Chase Harris Forbes Corporation.

Mr. Palmer: Your Honor, I am not conceding that just that way. The record shows that the Chase Securities Corporation withdrew from the state of Minnesota and filed a resolution of withdrawal with the Secretary of State.

Mr. Streissguth: There is evidence here from the deputy commissioner and letters showing that the change was made to Chase Harris Forbes on July 1, 1931. That is what I am referring to. Now, this is the question——

Mr. Palmer: I am not conceding anything.

Mr. Streissguth: All right. I know you are not.

Q. Whatever the date may have been when the change was made from the Chase Securities Corporation to the Chase Harris Forbes, did you continue as district manager of the new company under its new name?

A. I did.

Q. And until what time about?

[fol. 339] A. I was demoted, I think, about ninety days before the close of the office to a plain salesman.

Q. And about when was that, what year?

A. 1932.

Q. Then state whether or not during 1932 the Chase Harris Forbes Corporation closed its Minneapolis office.

A. It closed its office shortly after.

Q. And whether or not both companies at that time, following the closing of the Chase Harris Forbes, ceased all operations in the state of Minnesota?

Mr. Palmer: I shall object to that, your Honor, upon the ground it is improper re-direct and it is not material to the issues in this case.

Mr. Streissguth: Question of departure.

Mr. Palmer: If the court please, I object further on the ground no foundation is laid. As I recall, this witness said he left the employ shortly before the close of the Chase Harris Forbes office.

The Court: He may state, if he knows.

Q. If you know whether they closed the office and ceased doing business in 1932?

A. They did close their office.

Q. Did they cease doing business here then, I mean through the Minneapolis office?

Mr. Palmer: I shall object to that as calling for an opinion and conclusion of the witness. Whether they ceased doing business of soliciting and selling is quite a different thing than if they ceased doing all business in the state of Minnesota.

[fol. 340] The Court: He may state what he knows to be the fact.

Q. What do you know of their cessation of operations in 1932?

A. After they closed the office?

Q. Yes.

A. There was no further business done under the authority of the Minneapolis office. There was much business done that emanated from Chicago and New York.

Q. Were the Minnesota salesmen all discharged?

A. They were.

Q. Were the Minneapolis offices closed?

A. It was.

Q. And the offices in St. Paul and Duluth?

A. It was—they were.

Q. All agents in Minnesota discharged?

A. They were.

Mr. Streissguth: That is all.

Recross-examination.

By Mr. Palmer:

Q. Perhaps I am in error, Mr. Devine, but if I understood your testimony, you said that you were not in the employ of the Chase Harris Forbes Company at the time the office was closed?

A. That is true.

Q. That is true. Now, isn't it also true that you have no personal knowledge as to whether all of the salesmen were discharged or whether they ceased all business activities in this state or not?

[fol. 341] A. No, that isn't true. I do know.

Q. You do know. And don't you base your knowledge on what somebody else has told you, either the salesmen themselves or former employees of the office?

A. In other words, you——

Q. In other words, I am asking you if you don't base your knowledge about the cessation of business and the discharge of employees and salesmen upon what either the salesmen themselves told you or what some other employee at the office told you.

A. Well, I say that I base it on the best opinion that anybody could have, if they paid salaries, I suppose, after that time, why, they would be employed, but I have reason to believe they did not.

Q. Well, whether they paid salaries or not, isn't that a fact that it is based on what someone has told you, either a former employee or someone else connected with the office rather than upon your own personal knowledge of what was done by the office? You don't know what the books and records show as of that time, do you?

A. I do not.

Q. Then is it not a fact that you base your statements about ceasing business upon what some former employee or salesman of the company has told you?

A. Well, you would think they had closed the business when they locked up the office and discharged all the salesmen.

Q. Will you please answer my question?

Mr. Palmer: I move that the response be stricken as not [fol. 342] the answer to my question.

The Court: It may be stricken.

Mr. Streissguth: Your Honor, I don't see why counsel is quibbling about it. He admits it in his answer that they were through that time. Now, what is the argument?

Mr. Palmer: Now, we are about the Chase Harris Forbes Corporation. There is nothing in the answer about that.

A. Mr. Palmer——

Q. Just a moment.

Mr. Palmer: Mr. Reporter, will you read the question?

(The question is read by the reporter.)

A. That is true.

Mr. Palmer: That is all.

(Witness excused.)

Mr. Streissguth: Now, let's proceed with our notice to produce. Did you find some more trade accounts?

Mr. Palmer: I found some more papers, pardon me if——

Mr. Streissguth: Will you produce the papers which you think are trading accounts?

Mr. Palmer: I will produce the papers, but I will not give you my impression or opinion on those.

Mr. Streissguth: Now, I am asking what is asked for in paragraph 29, all books and records, statements, documents, or data in respect to other pools or trading accounts participated in by the defendant and/or Metpotan Securities Corporation.

Mr. Palmer: Now, if the court please, we have found it [fol. 343] impossible with such a broad demand in the notice to produce. They ask for "Books, records, statements, documents or data showing profits made by defendant and/or Metpotan Securities Corporation from trading accounts or pool operations of any kind or character in connection with Chase units made by it or them prior to September 15, 1929, in trading accounts and pools operated and/or participated in by defendant and/or Metpotan Securities Corporation for the period commencing January 1, 1928, up to and including September 15, 1929." In short, it is not specific enough to enable us to comply with it by the production of any document, any particular memorandum or record which the defendant may be in possession of. Possibly that information may be contained within the specific requests which are set forth in the notice to produce.

Mr. Streissguth: Your Honor, that same information that is now requested in our notice to produce was furnished by the defendant in the hearing before the Committee on Banking and Currency commonly called the Pecora Investigation. That matter was all discussed there and it has been discussed in the former trial in the Federal Court in this city. I am asking him for the information that is contained in the Pecora report and that was produced before the Senate

Committee, and if you don't produce it I will have to fall back upon secondary evidence in the Pecora record.

Mr. Palmer: Well, I will say that I have tried to comply with the notice. I am unable to comply with item No. 29 [fol. 344] because it is too broad and I do have other documents here. It seems to me that this 29 is a general summary or a summarizing of what has gone before.

Mr. Streissguth: Maybe you have some of the others. Have you what is referred to in the Pecora report as Committee Exhibit 20 showing the operations of the Dominick & Dominick pool, of July 19, 1929, to November 11, 1929?

Mr. Palmer: Many documents that I have here are not identified by reference to what you call the Pecora record. I have here certain documents, photostatic copies of documents, which are numbered in accordance with the notice to produce and you will help me a great deal if you will refer to some specific provision in the notice to produce so that I can see in my files where I have them.

Mr. Streissguth: Very well. Let's start all over again. Start with 22. I now ask you to produce the documents, letters and agreements, contracts referred to in paragraph 22 of the notice to produce.

Mr. Palmer: In response to the request contained in item 22 of the notice to produce, I hand you, Mr. Streissguth, photostatic copies of what appears to resemble the things that you ask for.

Mr. Streissguth: You are sure they resemble it?

Mr. Palmer: As near as I can make out.

(Plaintiff's Exhibit A-29 is marked for identification.)

Mr. Streissguth: A-29 is a letter from Metpotan Securities Company to Blair & Co., dated April 26, 1927. It is [fol. 345] offered in evidence at this time and will all be offered later, too, your Honor.

Mr. Palmer: If the court please, defendant objects upon each and all of the grounds which it has previously urged to the items called for in the notice to produce this morning. We also wish to incorporate in our objection the additional ground that the matter called for is immaterial to the issues here because it is too remote in point of time. It appears from this letter, for example, that it bears the date of April 26th of 1927. Now, we would like to have this objection relating to remoteness in point of time incorporated in our previous objections urged this morning.

Mr. Streissguth: We have no objection to that.

Mr. Palmer: You have no objection to incorporating that further ground.

Mr. Streissguth: I understand the court is reserving its ruling on all of this.

The Court: Yes.

Mr. Palmer: Yes, reserving the ruling subject to a motion to strike at some later point. Will it be necessary to do that?

The Court: Yes, of course you have that privilege at any time.

(Plaintiff's Exhibits A-30 and A-31 are marked for identification.)

Mr. Streissguth: A-30, the first page of a letter from Dominick & Dominick to the Chase Securities Corporation in reference to the formation of a trading account in Chase units dated January 7, 1930; Exhibit A-31, the second page of the same letter, are offered in evidence at this time.

[fol. 346] Mr. Palmer: It is understood that the same objection will stand as to all of these offers.

(Plaintiff's Exhibit A-32 is marked for identification.)

Mr. Streissguth: A-32, a letter on the stationery of the Chase Securities Corporation from the Chase Securities Corporation to Metpotan Securities Corporation dated January 9, 1930, stating that the trading agreements entered into by the Chase Securities Corporation were made in behalf of and for the account of Metpotan—Exhibit A-32 is offered in evidence.

The Court: Same objection on that?

Mr. Palmer: Same objection to the offer of each one of those exhibits.

In response to item 21 of the notice to produce we have handed to counsel for plaintiff photostatic copies of what appear to be documents being the description of items called for in 21.

(Plaintiff's Exhibits A-33 and A-34 are marked for identification.)

Mr. Streissguth: A-33, letter from Dominick & Dominick to Chase Securities Corporation dated July 19, 1929, 10,000 share pool with confirmation by the Chase Securities Corporation; A-34, letter from Chase Securities Corporation

to Metpotan Securities Corporation, dated July 24th, reciting that they have entered into this trading account in behalf of and for the account of Metpotan, both offered in evidence at this time.

Mr. Palmer: Same objection to this offer.

Mr. Streissguth: Now, in paragraph 23 under our notice [fol. 347] to produce we ask for records in over-the-counter purchases and sales by defendant and Metpotan from December 1, 1928, to August 12, 1929, purchases and sales.

Mr. Palmer: I have not produced in response to this item. I have nothing to produce in response to it. I am informed that there is no such a record or a record as such covering item. No. 23.

Mr. Streissguth: We then reserve the right to offer secondary evidence of the best character available in proof of that item.

Mr. Palmer: In any event there is no record of the defendant corporation, so far as I can find, of the information called for in item No. 23.

Mr. Streissguth: Item 24 calls for the stock transfer register of the defendant with reference to the certificates evidencing the Chase units sold and transferred to the plaintiff, showing names of persons or corporations from or through whom the stock was transferred to the plaintiff. We now ask for the above records.

Mr. Palmer: In response to the request in item 24 I hand you a photostatic copy of what appears to be the description of the thing called for in that item.

Mr. Streissguth: That doesn't give the information we have particularly in mind and that is where the certificate came from, Mr. Palmer, not what happened to it after Mrs. Donaldson got it, but where it came from, and that isn't in this information as far as I can see.

[fol. 348] Mr. Palmer: If the court please, I have endeavored to comply with the request in item 24 and it calls for stock transfer records of the Chase Securities Corporation and/or Bankers Trust Company of the City of New York as depository under agreement of March 21, 1917, with reference to Bankers Trust Company receipts issued to plaintiff in the above entitled action, or with reference to certificate evidencing Chase units sold and transferred to plaintiff in the above entitled action, showing the name or names of persons or corporations from whom or through

whom, directly or indirectly, said stock was transferred to plaintiff. Now, as I say, I have endeavored to respond to that by producing what resembles the thing asked for.

Mr. Streissguth: These accounts, your Honor, I will introduce them for what they are worth at this time.

(Plaintiff's Exhibit A-35 is marked for identification.)

Mr. Streissguth: We offer Plaintiff's Exhibit A-35, which are all ledger sheets or stockholder sheets in the name of Ruth Chase Donaldson beginning with Setpember 9, 1929. We offer them in evidence.

Mr. Palmer: We object on the same grounds previously urged.

The Court: Does your objection go to these, your record of the plaintiff's stock?

Mr. Palmer: What was that, your Honor?

The Court: I say, does your objection go to that exhibit, a ledger record, I take it, of the defendant?

[fol. 349] Mr. Palmer: If the court please, I object to it on the ground no foundation has been laid other than my response in response to the notice to produce. I haven't analyzed the sheets separately, but if I should withdraw my objection I hope I should have the right to some time later. In other words, your Honor, you point out that this is a record of the stock sold to Ruth Chase Donaldson.

The Court: That is what he said.

Mr. Streissguth: And the various companies.

Mr. Palmer: Well, I shall have no objection.

The Court: A-35 is received.

Mr. Streissguth: Now, Mr. Palmer, either your didn't understand or I didn't make myself plain, what we want is the records of the Chase Securities Corporation showing who owned the stock certificates which were transferred to Mrs. Donaldson in 1929.

Mr. Palmer: In other words, you want me——

Mr. Streissguth: The prior ownership.

Mr. Palmer: The predecessor shares.

Mr. Streissguth: That is right.

Mr. Palmer: The shares out of which her shares came.

Mr. Streissguth: And the ownership of those shares.

Mr. Palmer: I didn't so understand your item. Possibly it is under some other item, Mr. Streissguth.

Mr. Streissguth: We want the name or names of the person or persons from whom or to whom said stock was trans-
[fol. 350] ferred to the plaintiff, predecessor's certificate.

Mr. Palmer: If the court please, the matter called for by Mr. Streissguth is contained within item No. 39. Now I hand you, Mr. Streissguth, in response to your request in item No. 39, a photostatic copy of what appears to correspond with the description contained within the notice to produce.

The Court: I guess that is specifically set out in 39.

Mr. Palmer: It is in 39.

(Plaintiff's Exhibits A-36 and A-37 are marked for identification.)

Mr. Streissguth: A-36 is a record showing that the origin of the eight shares of stock sold to Mrs. Donaldson, being the same ones that have been referred to previously by number, stock certificate is in the name of George Stotz, Junior. We offer Exhibit A-36 in evidence.

Mr. Palmer: Same objection, your Honor, emphasizing that the matter called for is immaterial to the issues, as well as all of the other grounds that we have previously urged.

Mr. Streissguth: And Exhibit A-37 shows the predecessor certificate in the case of the one share dividend was the stock certificate in the name of George Stotz, Junior. We offer Exhibit A-37.

Now, your Honor, in addition to having the man in whose name the certificate was actually registered, I ask counsel to produce records showing the actual ownership. Do you concede that these stock certificates were owned by the Chase Securities Corporation?

[fol. 351] Mr. Palmer: I can't concede anything further than what appears from the face of the thing that you have demanded. In fact I can't concede anything about that because I don't admit that there is any foundation laid for it, and for all the reasons in the prior objection.

Mr. Streissguth: You admit that you made a sale of the stock. Now we want to have the record showing your ownership of the George Stotz stock certificate. Can you produce it?

Mr. Palmer: If the court please, we have tried to respond to the request made as to item 39 and these documents came

into my office this morning after diligent effort on our part to get them ready. The matter called for is defendant's stock transfer records showing from whom the shares of the Chase Securities Corporation, and represented by the Bankers Trust receipt delivered by defendant to plaintiff in August, 1929, was transferred and showing the name or names of the persons or corporations from or through whom, directly or indirectly, said stock was transferred to plaintiff. Now, it seems to me that we have responded with the thing that you have called for in item No. 39.

Mr. Streissguth: I will ask you whether, in addition to this, you have any evidence of the ownership of the stock certificate by any other firm or corporation, including the Chase Securities Corporation, the Metpotan Securities Corporation or Dominick & Dominick?

Mr. Palmer: My answer to that is, I don't know.

[fol. 352] Mr. Streissguth: 25 asks for documents, letters, agreements, contracts and records showing the ownership or control by the defendant Chase Securities Corporation of the Metpotan Securities Corporation during the years 1928, 1929 and 1930. The same might apply to 26, 25 and 26.

Mr. Palmer: In response to counsel's demand under items 25 and 26, I am producing what appears to be in response to the matter called for in the description contained in those items.

(Plaintiff's Exhibits A-38 and A-39 marked for identification.)

Mr. Streissguth: Plaintiff's Exhibit A-38, stock certificate number 1 of Metpotan Securities Corporation for 125 shares to William H. Cooper, and endorsed under date of August 11, 1921, to the Amerex Holding Corporation, is offered in evidence. We also offer Exhibit A-39, being certificate number 3 of the Metpotan Securities Corporation for 125 shares issued in the name of Henry Hargreaves and endorsed in blank under date of December 26, 1930, by Henry Hargreaves to the Amerex Holding Corporation, it also appearing from Exhibit A-38, being certificate number 1, that certificate number 1 is an original issue and it appearing from Exhibit A-39 that certificate number 3 is a transfer made from one Thomas K. Little, Jr. We offer those in evidence.

Mr. Palmer: We object to each and all of the exhibits offered on the grounds which we have previously urged.

Mr. Streissguth: Now, Mr. Palmer, those 250 shares rep-
[fol. 353] resented the outstanding shares of Metpotan, did they not?

Mr. Palmer: I don't know, Mr. Streissguth.

Mr. Streissguth: You don't know?

Mr. Palmer: No.

Mr. Streissguth: You don't know that there were only 250 shares outstanding?

Mr. Palmer: I am not authorized nor am I in a position to identify and lay a foundation for any of these exhibits. I am trying to respond to the notice to produce by producing what resembles what you ask for.

Mr. Streissguth: We reserve the right then to prove by Henry Hargreaves' own statement and by other secondary evidence that these shares were, in fact, all of the stock and that the Metpotan was a wholly owned subsidiary of Chase Securities Corporation.

27 asks for records with reference to options, rights, purchases and sales of Chase units from December 1, 1928, to August 12, 1929.

Mr. Palmer: I cannot produce such records. If called for, it would require the production of such a number of records that it would make it extremely burdensome for us to try and comply with it.

Mr. Streissguth: We then reserve the right to offer secondary proof in regard to those matters.

28 asks for satement rendered by Dominick & Dominick to Chase Securities Corporation and/or Metpotan Securities Corporation showing the report of the operations under trading accounts operated or managed by them prior to
[fol. 354] September 15, 1929. Can you produce that?

Mr. Palmer: If the court please, I am unable to respond to that item of the notice to produce. I am informed that no such statement was received by the defendant corporation and I am unable to produce the record of the Metpotan, if such a record exists.

Mr. Streissguth: We reserve the right to offer secondary evidence.

Under 29 we ask for any books, records, statements, documents or data showing profits made by defendant and/or Metpotan Securities Corporation from trading accounts or pool operations of any kind or character in connection with Chase units made by it or them prior to September 15, 1929.

Mr. Palmer: I am unable to comply with that request.

The request is too broad. It calls in such general terms for documents that we cannot comply with it.

Mr. Streissguth: Then we reserve the right to produce secondary evidence.

30 asks for all investment circulars, investment suggestions, prospectii and other printed or typewritten material circulated or distributed by or in behalf of the Chase Securities Corporation in the state of Minnesota during the months of March, April, May, June, July and August, 1929.

Mr. Palmer: In response to item number 30, I hand you what appears to be photostatic copies of the matter called for.

(Plaintiff's Exhibit A-40 marked by the reporter for identification.)

[fol. 355] Mr. Streissguth: Exhibit A-40 is what we attorneys have been referring to as "Investment Suggestions" distributed by the Chase Securities Corporation to its Minneapolis and other offices in August, 1929, and that is offered in evidence at this time.

Mr. Palmer: Defendant has no objection, your Honor. It is also stipulated that "Investment Suggestions" of which this is a specimen, were regularly delivered to the Minneapolis office; that "Investment Suggestions" of a similar character was delivered to the Minneapolis office for months prior to August, namely March, April, May, June and July.

Mr. Streissguth: For distribution to the customers of the Minneapolis and prospects of the Minneapolis office.

Mr. Palmer: Well, I shouldn't wish to go quite that far in view of what Miss Chapman testified to on one prior occasion when she said that she thought that this information was not for general circulation to the public but was for the benefit of the salesmen.

Mr. Streissguth: Well, that is going far enough, I guess.

The Court: Exhibit A-40 is received.

(Plaintiff's Exhibit A-41 marked for identification.)

Mr. Streissguth: Exhibit A-41 is a list of the offerings of bonds and securities by the Chase Securities Corporation under date of August 5, 1929. We have similar offering [fol. 356] sheets for other dates distributed throughout the year, including one for August 12 but this, it is agreed, is a specimen of those that were distributed from time to time.

Mr. Palmer: If the court please, I have no objection except that it does seem to me that this matter is immaterial. I notice from the contents here of this specimen offered that no reference whatsoever is made to the stock of the Chase Securities Corporation and Chase National Bank. It relates only to government, municipal, public utility, railroad, industrial, foreign, dollar bonds and preferred stocks.

Mr. Streissguth: It is on the issue of doing business and place of sales and in the upper right-hand corner the court will find listed among the offices the Minneapolis office. It hasn't any great materiality.

Mr. Palmer: With regard to that proviso to the prior stipulation about Miss Chapman's testimony that we did not make distribution to the public, I may be in error about that and I wish to withdraw that proviso that I just made.

Mr. Streissguth: Then it is agreed that this exhibit which has just been numbered A-41 and A-40, offerings of securities, were sent to the Minneapolis office for distribution to its prospects and customers?

Mr. Palmer: So far as I know that may well be the fact.

Mr. Streissguth: And similar ones on different dates from time to time.

[fol. 357] Mr. Palmer: Again I think that is the fact, but I prefer to have some evidence on the point, Mr. Streissguth.

(Discussion by counsel.)

Mr. Streissguth: It is stipulated now that similar circulars from time to time were received by the Minneapolis office and distributed to its customers and its prospects.

The Court: A-41 is received.

Mr. Streissguth: You promised to prepare tabulation showing increases in stock.

Mr. Palmer: What number is that?

Mr. Streissguth: 31.

(Plaintiff's Exhibits A-42 and A-43 are marked for identification.)

Mr. Streissguth: Exhibit A-42, your Honor, is a statement from 1926 to 1929, inclusive, of the capital stock, the increases, the surplus, the yearly profits, reserves and dividends prepared at our request by the defendant and now offered in evidence. I might incidentally say, your Honor,

you are perhaps anxious to know why we want to show yearly profits. We have a statute in this state that any security might be registered by notification if for a period of three years prior to the Securities Commissioner receiving such notice the stock has earned six per cent, that entitles the stock to registration by notification instead of by application upon mere filing of a notice. This is offered for the purpose of showing that such profit was not earned, and therefore this stock was not entitled to registration by notification, as bearing upon the question of intentional [fol. 358] violation of the statute, if that becomes an issue.

Mr. Palmer: Now, if the court please, my only objection to this Exhibit A-42 is that it is not material to the issues and I also call the court's attention to the fact that it is too remote in point of time to have any bearing upon the issues. Now with respect to what counsel says about the Securities Act of Minnesota, I take issue with him on the construction which he places on that statute. I don't believe that it is susceptible of such a simple construction as counsel has outlined.

The Court: Well, I will receive the exhibit and those questions will probably be taken up later in the argument.

Mr. Streissguth: Exhibit A-43, prepared at my request by counsel for the defendant, is a statement of the corporate structure of the Chase National Bank and Chase Securities Corporation over a period of years. That is offered in evidence.

Mr. Palmer. We have no objection except that in so far as it deals with the period of 1920 right through to 1927 the matter may be too remote in point of time. However, we make no point of the matter and we will withdraw the objection.

Mr. Streissguth: Very well.

The Court: It may be received.

Mr. Streissguth: Can you respond to paragraph 32 in reference to volume of sales, monthly purchases and sales?

Mr. Palmer: No, I cannot respond to item 32.

Mr. Streissguth: You cannot produce?

[fol. 359] Mr. Palmer: I cannot produce.

Mr. Streissguth: We reserve the right to offer secondary evidence.

Mr. Palmer: I want to call the court's attention to the fact that the matter called for is not a matter relating to the books and records of the defendant. The matter called for in 32 relates to a summary, or must relate to a summary, although it is phrased in the form of asking for books and records and that those would have to be compiled from the Metpotan Securities Company records entirely and not the records of the defendant.

Mr. Streissguth: Well, in the absence of the production by the defendant we reserve the right to offer secondary proof.

Under 33 we ask for the range of the stock market prices.

Mr. Palmer: It may be stipulated that the range of price of Chase units for the years 1927, 1928 and 1929 were as follows: 1927 ($100 par) low $421.00, high $635.00; 1928 ($100 par) low $530.00, high $888.00; 1929 ($100 par) low $840.00, high $1,320.00; 1929 ($20.00 par) low $135.00, high $287.00.

Mr. Streissguth: 34 asks for records showing the salaries, bonuses, and other compensation paid to its officers and directors during 1927, 1928 and 1929.

Mr. Palmer: I am unable to produce any such record.

Mr. Streissguth: We reserve the right to produce secondary evidence.

[fol. 360] 35, loans made by the defendant corporation to its officers during 1928 and 1929 with a statement of the collateral.

Mr. Palmer: If the court please, we are unable to produce anything in compliance with that request and we don't see that it has any material bearing at all to the issues in this case.

Mr. Streissguth: We reserve the right to offer secondary proof.

Now under 36 we ask for loans made by defendant to the Shermar Corporation, the Murlyn Corporation and the Clingston Company.

Mr. Palmer: If the court please, we are unable to respond to this item and have not produced in response to it. Again I don't see what possible bearing this can have upon the issues of the case, assuming that such a record does exist.

Mr. Streissguth: We will show that the Shermar and Murlyn were corporations of Mr. Wiggin, chairman of the board, and that they were very active in the manipulation of the stock during the year 1929, if you won't produce this information.

How about 37, the number of shares of stock owned by the Shermar Corporation, the Murlyn Corporation and the Clingston Company.

Mr. Palmer: I have no record to respond to this item. I have nothing which resembles the information which is called for in that item.

Mr. Streissguth: 38 calls for financial statements of Chase Securities Corporation for the years 1927, 1928 and 1929 on December 31.

[fol. 361] (Plaintiff's Exhibit A-44 is marked for identification.)

Mr. Streissguth: We will offer first the Plaintiff's Exhibit A-44, annual report for the year 1928, which is dated January 8, 1929.

Mr. Palmer: We shall object to this offer upon the grounds that it is not material to any of the issues in the case; that it is too remote in point of time and that no foundation has been laid for its introduction in evidence and that it is therefor incompetent and hearsay. I am making the same general objections that I have urged before just to save any question for the record.

The Court: I think I will receive that.

Mr. Streissguth: Then it is understood that Mr. Palmer will supply, if he has them, the corresponding statements for the years 1927 and 1929, and we are willing that he have that opportunity.

Have you furnished me 40? Those are the stock certificates. I think 40 has been furnished. Have those stock certificates been furnished?

Mr. Palmer: I think not.

(Plaintiff's Exhibits A-45, A-46, A-47 and A-48 are marked for identification.)

Mr. Streissguth: I have here, your Honor, four certificates which have been numbered by the reporter. In view of counsel's willingness to stipulate, Plaintiff's Exhibit A-46, in reference to that it is stipulated that stock certifi-

cate bearing number F53870 for one share of stock and Bankers Trust Company receipt dated July 26, 1929, was transferred to Ruth Chase Donaldson and was one of the [fol. 362] certificates included in the original sale to her. Likewise with certificate Bankers Trust Company receipt number F57697 for three shares and stock certificate in the name of George Stotz, Jr., for three shares, dated July 30, 1929, was endorsed and delivered to her as part of the sale of August 12th, which is here in issue. And in reference to the eight shares, Bankers Trust Company receipt number F57746 for four shares and stock certificate in the name of George Stotz, Jr., was endorsed to Ruth Chase Donaldson and delivered to her by the defendant as part of the transaction here in issue on or about August 12, 1929; and that stock certificate number F181064, Bankers Trust Company receipt for one share and stock certificate in the name of George Stotz, Jr., was endorsed to her and delivered to her as a dividend on the eight shares previously bought. We do not care about the certificates themselves.

(Recess.)

Mr. Streissguth: 41, you say, Mr. Palmer, notice to stockholders——

Mr. Palmer: Notices and the like I will supply in the morning. Will Mrs. Donaldson be here in the morning?

Mr. Streissguth: Yes.

42, with reference to the authority of the firm of Rushmore, Bisbee & Stern of New York and Millbank, Tweed, Hope & Webb, to appear for the Chase National Bank and the Chase Securities Corporation at the hearing before the Committee of Banking and Currency of the United States [fol. 363] Senate Subcommittee in the year 1933 during the so-called Pecora investigation.

Mr. Palmer: If the court please, I am unable to respond to that item. So far as I know there never was such.

Mr. Streissguth: We reserve the right to offer secondary evidence.

Number 43, stock owned by Albert Wiggin, record of stock owned.

Mr. Palmer: Likewise I am unable to respond to that item of the notice to produce.

Mr. Streissguth: You mean you have no record of it?

Mr. Palmer: I mean I have no record and in—I should say this, I have no record with which to respond to the notice to

produce. Now I am unable to state whether there is such a record or not, but I cannot respond to the notice to produce.

Mr. Streissguth: I understand your position. I reserve the right to produce secondary evidence.

(Plaintiff's Exhibits A-49 and A-50 are marked for identification.)

Mr. Streissguth: Exhibit A-50 is an annual report covering the year 1929, the report being dated January 14, 1930. We offer it in evidence.

The Court: Report of the defendant?

Mr. Streissguth: Chase Securities Corporation and Chase National Bank.

Mr. Palmer: If the court please, with respect to this offer our only objection is that it is not material to the issues in the case and that no sufficient foundation has been [fol. 364] laid for its introduction.

The Court: I think I will receive that.

Mr. Streissguth: And Exhibit A-49 is the annual report for the year 1927, the report bearing date January 10, 1928, and it is now offered in evidence.

Mr. Palmer: We object to that upon the same grounds as the preceding exhibit, namely that it is not material to the issues in this case; that no proper foundation has been laid and also that it is immaterial because it is too remote in point of time.

The Court: It will be received.

Mr. Streissguth: Under 44 of our notice to produce, paragraph 44, we ask for the date of the delisting of the stock from the New York Stock Exchange ~~and any other~~ stock listing.

Mr. Palmer: In response to item 44 of the notice to produce we hand you what appears to correspond with the description of what you called for, and the photostatic copy of the thing which appears to respond to the description in the notice to produce.

(Plaintiff's Exhibit A-51 is marked for identification.)

Mrr. Streissguth: Exhibit A-51 (a letter from Mr. Simmons, president of the New York Stock Exchange, to the Board of Directors of the Chase Securities Corporation, dated January 11, 1928, stating that at the request of the

defendant the stock was taken off of the New York Stock [fol. 365] Exchange. Have you got their request there?

Mr. Palmer: This is the only thing I have.

Mr. Streissguth: All right. It is stipulated that at the time of the transaction with the plaintiff, Mrs. Donaldson, in question here, the stock was not listed on any stock exchange.

Mr. Palmer: I wouldn't be prepared to go quite as far as that.

Mr. Streissguth: We will make it the New York Stock Exchange, the Boston Stock Exchange and the Chicago Stock Exchange and the Curb Exchange of New York.

Mr. Palmer: It may be so stipulated.

Now with respect to Plaintiff's Exhibit A-44, I would like to reserve for the record my objection to that on the ground of lack of foundation, that it is incompetent and hearsay. I want to be as consistent as I can upon my basis for objection to all of these exhibits that are offered, because there is no connection whatever, no identification of the person who purportedly signs this last mentioned exhibit as a person authorized to act for or connected with the company that the person purportedly signs for.

The Court: That may be added to the objection.

Mr. Palmer: Pardon me?

The Court: I say that may be added to your general objection.

Mr. Streissguth: Under 46 we want the record showing the official position held by our friend Henry Hargreaves.

Mr. Palmer: Just a minute, please. In the last objection [fol. 366] that I urged I referred to Exhibit A-44, and it should be Plaintiff's Exhibit A-51.

Mr. Streissguth: Under 46 we ask for the record showing the official position of Hargreaves.

Mr. Palmer: I hand you in response to item 46 what appears to respond to the thing described in that item of the notice to produce.

(Plaintiff's Exhibits A-52 and A-53 are marked for identification.)

Mr. Streissguth: Exhibit A-52, a certified copy of a resolution adopted on January 12, 1921, appointing Henry Hargreaves as cashier, bond manager and auditor of the Chase Securities Corporation; Exhibit A-53 is a certified

copy of a resolution adopted on May 16, 1928, by the Board of Directors of the Chase Securities Corporation appointing Henry Hargreaves as assistant treasurer with authority to perform the duties of the treasurer in his absence or as occasion may require and abolishing the office of cashier. We offer those in evidence; and I might say, your Honor, that becomes important in connection with the secondary proof we have to offer here in reference to the various matters and also to show the authority of Mr. Hargreaves.

Mr. Palmer: If the court please, defendant objects on the ground that the offer is not material to the issues in the case; no foundation has been laid; that the matter is incompetent therefore and hearsay.

The Court: They may be received.

Mr. Streissguth: Mr. Edelman has just called to my [fol. 367] attention in reference to the stock of the Metpotan Company there are two certificates of 125 shares each, one in the name of Henry Hargreaves, who has just been identified, and the other in the name of William H. Cooper, who, according to the annual report, is the assistant secretary of the Chase Securities. So that is why we claim it is a wholly owned subsidiary, but we will prove that by other evidence.

How about Albert Wiggin's position? Have you anything on that? 47? Also under 43, the period is for 1928 and before.

Mr. Palmer: I am unable to respond to that item.

Mr. Streissguth: We will offer secondary evidence.

The last one I have here is in reference to the offices or official positions of employment of Martin Conroy.

Mr. Palmer: To the best of my knowledge I am unable to respond to that item in the notice to produce. So far as I know, Conroy was never an officer of the defendant and held no official position and employment of any kind with the defendant corporation, nor was such a person of such a name authorized to act.

Mr. Streissguth: That is Martin Conboy instead of Conroy. Would that make any difference?

Mr. Palmer: It would make none.

Mr. Streissguth: It would make no difference?

Mr. Palmer: I should qualify that last statement by say- [fol. 368] ing it should make no difference as far as I know.

Mr. Streissguth: Now just one other item here, Mr. Palmer, you may be willing to stipulate on. Will you agree that Henry Hargreaves at the time of the commencement of this action was still secretary and treasurer of Amerex Holding Corporation and a director?

Mr. Palmer: I would like to accommodate you, Mr. Streissguth, but I do not like to bind the defendant by any admission of this character, so I must decline and put you to the proof.

Mr. Streissguth: Very well.

And you cannot make any stipulation in reference to his official position in the year 1935 or at any time?

Mr. Palmer: I cannot. I would like to accommodate you, Mr. Streissguth, but I cannot do so.

Mr. Streissguth: All right.

(Plaintiff's Exhibit A-54 is marked for identification.)

Mr. Streissguth: Exhibit A-54 is an affidavit, part of the files of the case of Hillard H. Holm against the Chase Securities Corporation, being number 364235 of this court, an action brought in Hennepin County. The files show that in support of the motion to set aside service of the process an affidavit was introduced by the defendant and we offer the affidavit of Henry Hargreaves presented to the court in that action by the defendant Chase Securities Corporation and the only material portion of it I shall read into the record and perhaps we can stipulate that that can be [fol. 369] used in lieu of the original.

Mr. Palmer: I have no objection to that. My objection to the offer is this, that no foundation has been laid to show that Mr. Hargreaves is an officer authorized to act for the defendant corporation. Now it is true that Mr. Streissguth is offering what purports to be an affidavit made by Mr. Hargreaves and purportedly that affidavit shows that Mr. Hargreaves was an officer of the company at the time. However, it is a well established rule that the authority of an agent cannot be established by the statements of the agent himself. There must be proof independent of the statements or representations made by the agent connecting him up and showing his employment and authority to act for the corporation. My point then as to foundation is that there is no showing, independent of this affidavit, that Mr. Hargreaves is an officer of the defendant or that he was

authorized to speak for and bind the defendant. Our objection raises the point; and the further ground that the affidavit is incompetent and hearsay.

(Arguments.)

Mr. Streissguth: Now I will read the material portion of this affidavit:

[fol. 370] "State of Minnesota,

County of Hennepin:
District Court, Fourth Judicial District

Hillard H. Holm, Plaintiff,

vs.

Chase Securities Corporation, Defendant

Action No. 2

STATE OF NEW YORK,
County of New York, ss:

HENRY HARGREAVES, being first duly sworn on oath, deposes and says:

1. That he is the Secretary and Treasurer and a Director of Amerex Holding Corporation, the above named defendant, which is sued herein under its former name of Chase Securities Corporation, and that he has been employed by defendant since the time it was organized; that this affidavit is made in reply to the affidavits submitted on behalf of the plaintiff in opposition to defendant's motion to set aside service made upon the Commissioner of Securities, to-wit:"

And then the final paragraph of the same affidavit, omitting the seventy-two paragraphs intervening—

[fol. 371] "Further, affiant sayeth not, except that affiant makes this affidavit in support of a motion by the defendant for an order of this court vacating and setting aside the attempted service of the summons and complaint herein upon the defendant by leaving copies thereof with the Commissioner of Securities of the State of Minnesota, and in reply to the affidavits submitted on behalf of plaintiff in opposition to such motion.

Subscribed and sworn to before me this 10th day of October, 1935.

B. A. Gunn, Notary Public, N. Y. Co. Clerk's No. 330 Reg. No. 6G839, Commission expires March 30, 1936."

And I might also say that attached to this affidavit are records, photostatic records of the Chase Securities Corporation similar in content to those which are offered upon this trial.

(Argument.)

The Court: Has there been an offer?

Mr. Streissguth: We are offering the entire affidavit, but I understood counsel was willing to stipulate that the material portion of it was that portion that was read and that was all that need be offered. I am now offering Plaintiff's Exhibit A-54 in proof of Henry Hargreaves' official capacity on the date of the affidavit and that is all preliminary to some other matters that we are going to prove by secondary evidence.

Mr. Palmer: I shall have no objection, your Honor, to offering a part of the affidavit as such. My objection, as [fol. 372] the court knows, goes to other and deeper matters.

Mr. Streissguth: You will admit that this affidavit is part of this file, as I have said?

Mr. Palmer: Right.

Mr. Streissguth: And that it is offered by the Chase Securities Corporation in that action in a motion to quash service?

Mr. Palmer: I would say that it appears in the file of the Clerk of Court.

Mr. Streissguth: Having been used for that purpose.

Mr. Palmer: As part of the motion made by the defendant.

Mr. Streissguth: That is sufficient.

The Court: I think I will receive that portion of the affidavit read.

(At this time recess was taken until 9:30 o'clock A. M., May 12, 1939.)

May 12, 1939, 9:30 A. M.

RUTH CHASE DONALDSON, re-called for further cross examination, testified:

By Mr. Palmer:

Q. Mrs. Donaldson, I hand you what purports to be a photostatic copy of a dividend check issued to you by the Amerex Holding Corporation under date of July 15, 1930, as a dividend check. I will ask you if your endorsement appears upon that purported dividend check.

A. Yes.

[fol. 373] Q. Do you recognize that photostatic copy as a true——

Mr. Streissguth: We will admit that they are true and correct copies of the originals, without the necessity of asking.

Q. Did you receive and cash this dividend check?

A. Yes; apparently it was deposited in my account, I see.

Q. Calling your attention to Defendant's Exhibit 13, which purports to be a series of dividend checks issued to you by the Chase National Bank and the Amerex Holding Corporation in the year 1937, I will ask you if you recognize this Defendant's Exhibit 13 as a series of dividend checks which were endorsed by you and received and cashed by you.

A. Yes, they are endorsed by me, and I presume that they are the photostatic copies of the checks that I received.

Mr. Streissguth: It will be so admitted.

Q. Calling your attention to Defendant's Exhibit 14, which purports to be dividend checks issued to you by the Chase National Bank and the Amerex Holding Corporation for the year 1938, I will ask you if you received the checks, if you endorsed them and had them deposited to your account?

A. I did.

Q. Calling your attention to Defendant's Exhibit 15, which purports to be dividend checks issued to you by the Amerex Holding Corporation and the Chase National Bank [fol. 374] in the year 1939, I will ask you if your endorsement appears upon them and if you received and had the checks deposited to your account?

A. Yes.

Mr. Palmer: Now, if the court please, for the purposes of the record, Defendant's Exhibit No. 12 is a dividend check of the Amerex Holding Corporation, dated July 15, 1936, issued to the plaintiff in the sum of 50 cents; Defendant's Exhibit 14 consists of four dividend checks, the first being dated February 1, 1938, issued to the plaintiff in the amount of 70 cents and covering dividend issued by Amerex Holding Corporation, the second being dated February 1, 1938, issued to the plaintiff, and a dividend check of the Chase National Bank in the sum of $6.30, the third a dividend check dated August 1, 1938, a dividend check of the Chase National Bank issued to the plaintiff, in the sum of $6.30, the fourth being a dividend check of the Amerex Holding Corporation, dated August 1, 1938, issued to the plaintiff in the sum of 70 cents; Defendant's Exhibit 13 consists of four dividend checks, the first being dated February 1, 1937, a dividend check of the Amerex Holding Corporation, issued to the plaintiff, in the sum of 50 cents, the second being a dividend check dated February 1, 1937, issued to the plaintiff by the Chase National Bank in the sum of $6.30, the third a dividend check of the Chase National Bank, dated August 2, 1937, issued to the plaintiff in the sum of $6.30, the fourth being a dividend check of [fol. 375] the Amerex Holding Corporation, issued to the plaintiff, in the sum of 50 cents; Defendant's Exhibit 15 consists of two dividend checks, the first being dated February 3, 1939, being a dividend check of the Amerex Holding Corporation, issued to the plaintiff in the sum of 70 cents, the second being a dividend check dated February 1, 1939, of the Chase National Bank, issued to the plaintiff, in the sum of $6.30. We offer in evidence Defendant's Exhibits 12, 13, 14 and 15.

Mr. Streissguth: Now, your Honor, we object to these exhibits, particularly to Defendant's Exhibit 15, consisting of checks dated in 1939, and to Defendant's Exhibit 14, being the checks in the year 1938, on the ground that under the evidence as it now appears a tender was made in October, 1937, and refused by the defendant corporation in November, 1937; and if these exhibits are offered for the purpose of establishing any ratification or estoppel, of course it being the rule that a party is not required to keep a tender open after it has been rejected, or to go through another ceremony or useless act. For that reason we object

to these exhibits if they are offered for the purpose of showing a ratification or estoppel. We have no objection to them being received for the purpose of establishing the amount which the plaintiff has received and which she should tender to the defendant to entitle her to recover her money back.

Mr. Palmer: If the court please, these dividend checks are most certainly offered on the issue of ratification and estoppel. It is plain from the so-called tender letter which [fol. 376] was written in 1937, that the defendant objected to the tender upon grounds which the plaintiff could cure. It is further perfectly apparent that the tender which was purportedly made at that time was completely and entirely ineffective as a valid tender. Notwithstanding her failure to cure her tender and make a proper tender, she accepted thereafter dividend checks right from the time following the commencement of her action down to the present time. So we offer them on the issue of ratification and estoppel, as well as upon whatever other issues it has any bearing.

The Court: I suppose that is one of the questions of fact for the court to determine, as to the nature of the tender and whether the tender was kept open. I presume on that theory they might be admissible.

Mr. Streissguth: Well, I just don't want to let it go in unchallenged, that is all. As to Defendant's Exhibit 12, being a check in the year 1936, and Defendant's Exhibit 13, two checks dated February 1, 1937 and one check dated August 2, 1937, which was cashed on August 20, 1937, we object if they are offered for the purpose of showing any ratification or estoppel, on the ground that the undisputed evidence now shows that there was no discovery of any irregularities prior to the time of the cashing of these checks. We have no objection to the court's receiving these exhibits for the purpose of establishing the amount of the setoff against any recovery that the plaintiff might be [fol. 377] entitled to.

Mr. Palmer: Of course, your Honor, I didn't intend to limit myself by offering these only with respect to the issues of ratification, but on whatever issues they have any bearing. In other words, I offer them generally.

The Court: Well, they will be received, and the court will determine later just what materiality and what weight they may have.

Q. Near the end of our cross-examination the other day you said you would look into your records and see whether you could find any evidence of whether you had a trading account besides the one which you had with Paine Webber the year after President Roosevelt took office. Did you look in your files?

A. I haven't any records.

Q. You haven't?

A. No, I don't remember any other account.

Q. Did you look into the records of the Chase Investment Company, or ask your brothers whether they had any record of such trading account?

A. I didn't, but you have their books right there, haven't you? I thought you had a photostatic copy of all their entries.

Q. I have a photostatic copy of the records covering the period 1926 through 1929.

A. Anyway, they would have no such records. They wouldn't have anything like that.

Q. They wouldn't have any record of any trading account which you had?

A. No.

[fol. 378] Q. Would you have any record independent——

A. No, I wouldn't.

Q. —of a record kept by the Chase Investment Company?

A. No, I wouldn't, none whatever.

Q. None at all?

A. No.

Q. Have you looked to see if you have any record, any memorandum, a slip of paper, something of that sort?

A. No, but I know I haven't because I don't keep any papers.

Q. Does your husband keep any papers for you?

A. No, not of mine.

Q. Do you recall whether or not you did or did not have a trading account with some other investment house than Paine Webber for the period commencing January 1, 1930, extending right down to the present time?

A. No; none of which I have any record at all, or that I have any recollection of.

Q. Would you say that you did not have such an account?

Mr. Streissguth: Objected to as repetition.

The Court: She may answer.

Mr. Streissguth: She says she has no recollection.

A. I have no recollection of having any other account except the one with Paine Webber.

Q. Mrs. Donaldson, have you given a power of attorney to the Chase Investment Company at any time?

[fol. 379] A. I don't know.

Q. Did you ever hear of a power of attorney before?

A. Yes; I have heard of a power of attorney, but I don't know exactly what it covers.

Q. Has the meaning of power of attorney ever been discussed with you or explained to you before?

A. No.

Q. If you had given a power of attorney to the Chase Investment Company you would undoubtedly recall having heard it discussed before, wouldn't you?

Mr. Streissguth: Objected to as argumentative.

A. I don't know whether I would or not. I think I have implicit faith in my brothers and they have always made investments for me. Perhaps they had to have power of attorney to do that. I don't know.

The Court: Do you want a ruling on that? She answered the question.

Mr. Streissguth: No.

Q. Well, do you recall whether you did have a power of attorney running to the Chase Investment Company, or your brothers in that company, or your father in that company during the period of 1926 down to 1929?

A. I do not recall.

Q. Does the Chase Investment Company keep a record for you of all the bonds and preferred stocks or other similar securities?

A. Now?

Q. No, did they in 1926 to 1929?

[fol. 380] A. Yes, I believe they did.

Q. Do they keep a record of all those securities which were owned by you at that time?

A. I don't know. I suppose they do. They are registered in the book, aren't they?

Q. Do you know whether they kept a record for you other than the record which appears in that book?

A. No, I don't know.

Q. Now, you have been asked to produce, Mrs. Donaldson, all your books and records showing what bonds, stocks and other such securities that were held by you in 1929. Has your counsel discussed with you that item in the notice to produce?

Mr. Streissguth: That is objected to as confidential and privileged. I am prepared to answer any demands as far as the notice to produce.

Objection sustained.

Mr. Palmer: Very well, Mr. Streissguth, in response to item No. 9 in the notice to produce, are you now prepared to produce a record of all the stock, bonds and securities which were owned by Mrs. Donaldson in 1929?

Mr. Streissguth: We have no record. The only record there has been is the record kept by the Chase Investment Company, and over which we have no control. We have given you the benefit of the testimony of Elbridge Chase and the records maintained by the Chase Investment Company. Other than that we have no records.

Mr. Palmer: Do you mean by that that you have not produced such record?

[fol. 381] Mr. Streissguth: We have no record to produce except what has already been produced.

Mr. Palmer: As I understand you, there is no record other than the records which have been produced.

Mr. Streissguth: I have told you. I have answered your question. We have no record.

Mr. Palmer: Do the Chase Investment Company have a record which it keeps for Mrs. Donaldson of all securities which were owned by her in the year 1929?

Mr. Streissguth: The only record of the Chase Investment Company pertaining to Mrs. Donaldson's accounts in 1929 has been produced and is now in evidence, as far as I know.

Q. Calling your attention to item No. 12, you have been asked to produce all confirmation slips, orders, letters and other instruments in writing delivered to you by defendant and relating to the stock involved in the action above entitled. Now, do you have with you a letter dated August 15, 1929, addressed to Mr. and Mrs. Frank A. Donaldson, 4615 Emerson Avenue South, Minneapolis, Minnesota, and signed by S. B. Terry, vice-president?

Mr. Streissguth: The one of which you offered a copy?

Mr. Palmer: That is right.

Mr. Streissguth: We have nothing, Mr. Palmer, except the confirmation slip. There will be no dispute, though, as to the letter having been received by Frank Donaldson, one of the parties to whom it is addressed. But the only [fol. 382] record Mrs. Donaldson had in this entire transaction was the confirmation slip which is now in evidence.

Mr. Palmer: If the court please, the defendant renews its offer of Defendant's Exhibit 8.

Mr. Streissguth: We withdraw any objection, in view of Mr. Devine's explanation.

The Court: It will be received. That is the one she said she didn't remember receiving.

The Witness: No, I don't think I ever saw it.

Mr. Palmer: That is the one, your Honor, where the testimony, I believe, is as follows:

Mr. Streissguth: It is in the record now.

Mr. Palmer: I wouldn't like to have any dispute about what she said. If I recall her testimony, she said she didn't remember receiving the letter, but that she undoubtedly did receive it.

The Court: I remember the testimony.

The Witness: Yes. I said I thought I must have seen it.

The Court: It is in evidence now without objection.

Q. Mrs. Donaldson, did you have securities in your custody and which belonged to you other than those shown by the books which the Chase Investment Company produced the other day?

A. No. In 1929?

Q. In 1929.

A. No, not to the best of my belief, I had nothing else.

[fol. 383] Redirect examination.

By Mr. Streissguth:

Q. Mrs. Donaldson, it appears from the record in this case by Defendant's Exhibit 7 that on or about October 11, 1937, you tendered the stock which you had purchased, and that on November 29, 1937, as shown by Plaintiff's Exhibit A-5, the stock was returned to you and the tender refused. Apparently the first checks that you received as a dividend were those of February 1, 1938, shown by De-

fendant's Exhibit 14. Now, you say you accepted those checks?

A. Yes, sir, I did.

Q. Why did you accept them?

Mr. Palmer: I object to that, your Honor, as calling for an opinion and conclusion of the witness, and improper redirect.

The Court: Objection sustained.

Mr. Streissguth: We offer to show that she accepted them because of the refusal of her prior tender and upon instructions of her attorney, if that is material.

The Court: Well, I presume if the tender was properly made it would be a matter of law, anyway.

Mr. Streissguth: We offer to prove, first and separately, that these checks subsequent to November 29, 1937, were accepted by her because the defendant had previously refused the tender of the return of the stock purchased by her, and the dividends, rights and other advantages, with interest.

Mr. Palmer: Well, I would have no objection, and I think [fol. 384] we can probably stipulate that she accepted the dividends upon advice of counsel, but outside of that I would not wish to go, Mr. Streissguth. We can dispose of your offer by such stipulation.

Mr. Streissguth: You will stipulate that the checks which were cashed by her subsequeat to the date of the tender were accepted by her upon advice of counsel?

Mr. Palmer: That she accepted the checks upon advice of counsel.

The Court: I think perhaps that covers it.

Mr. Streissguth: Very well.

Q. And the last check that you cashed prior to your tender was the check of August 2, 1937, which you cashed on August 20, 1937?

A. Yes.

Q. At the time of cashing that check had you discovered any irregularity, or any illegality, or misrepresentation in reference to this purchase of stock?

A. No, sir.

Q. It was between that date and the date that you wrote the letter of tender that you made your discovery the first time?

A. Yes.

Q. That is all.

Mr. Streissguth: At this time, your Honor, we intend to offer from a previous record of a case tried in this court entitled Benjamin Segal versus Chase Securities Corporation, tried before your Honor in 1935, and reported by Mr. [fol. 385] Clifford H. Ward, who is acting as court reporter in the instant case. Now, Mr. Palmer, so far as this transcript is concerned, is it agreeable to you that we dispense with the laying of any foundation and accept the transcript as a true and correct copy of the proceedings?

Mr. Palmer: Yes, it may be understood we waive any laying of foundation so far as calling the reporter for his original notes. However, we will have an objection based upon foundation, but the foundation which we object to is not that particular matter. My ground is based upon the claims that there is no proof of the agency of Mr. Hargreaves or his authority to act outside of that which is contained within the admission itself. In other words, the declaration of the agent cannot be relied upon as proof of the fact of agency.

The Court: Raising the same question that you did yesterday.

Mr. Palmer: Raising the same question that I did yesterday.

Mr. Streissguth: We will call Mr. Henry Hargreaves for cross examination under the statute. Will you produce Mr. Hargreaves?

Mr. Palmer: I don't see Mr. Hargreaves here.

Mr. Streissguth: He is in New York?

Mr. Palmer: He is in Mexico, I am informed, visiting his daughter, who is located there.

Mr. Streissguth: Being out of the jurisdiction, I think that is what we wanted to establish. We are offering now the entire testimony of Henry Hargreaves, whom we have [fol. 386] shown to be an officer during all these years, as given at the Segal trial. It is offered not only as direct evidence and primary evidence, but also, your Honor, as secondary evidence on the matters which were referred to in the notice to produce, and which the defendant refused to produce, failed to produce.

Mr. Palmer: Does that complete your offer Mr. Streissguth?

Mr. Streissguth: Correct.

Mr. Palmer: The plaintiff objects to the offer on the ground that no foundation has been laid, that it is hearsay and incompetent; also that the matter offered is not material or relevant to any issue or issues in the present case; that, furthermore, the plaintiff is attempting to prove his matters in a way which it is not customary to prove a case in court or at law; that the accepted mode of proving such matters is by deposition; and the file discloses that there has been no attempt to take a deposition of Mr. Hargreaves or anyone else connected with the defendant. We will add as a further objection here to the record that if the matter offered is not offered for the purpose of establishing or constituting an admission of the defendant, if it is not offered for the purpose of showing some position taken by the defendant which is inconsistent with what evidence there is in the case, or what has been pleaded in the case, then we object to the matter and its purported use as direct or primary evidence on the ground that it is incompetent, hearsay, and no foundation whatsoever being laid for its use in the case.

[fol. 387] The Court: The question is quite a mooted one. It seems to me more or less close. I think I will take it subject to the objection, with the privilege of moving to strike out later.

(A short recess.)

Mr. Streissguth: We offer now the following portions of the testimony of Henry Hargreaves given in the case of Benjamin Segal, plaintiff, versus the Chase Securities Corporation, defendant, being case No. 354928, tried in the District Court of Henhepin County, Minnesota, before the Honorable Winfield W. Bardwell, beginning on May 23, 1935, and continuing for a number of days thereafter. We read first and offer first, the testimony of Mr. Hargreaves beginning on the top of page 313 and continuing to the middle of page 314, ending with the question and answer "Q. When was that? A. In May, 1933."

Mr. Palmer: I would like to note my objections to these various offers, your Honor. I would like to make them to each set of pages that are offered because the testimony called for on one page may relate to a time which we claim has no relevancy to the issues in this case. To your first offer, which is pages 313 to 314, and the title of the action, the defendant objects on the ground that the offer is incom-

petent, hearsay, that no foundation has been laid, that the offer is irrelevant and not material to the issues in this case; that the offer does not accord with the customary and established way of proving actions at law or proving a case in court; that the only proper way to prove such matters is by [fol. 388] taking the deposition of some officer or agent of the defendant.

The Court: There will be the same ruling.

Mr. Streissguth: We next offer that portion of the record referred to commencing at the bottom of page 90, with the introduction of Henry Hargreaves as being first duly sworn, and then the testimony itself beginning on page 91 and continuing on the following pages, 91, 92, 93, 94, 95, 96, 97, 98, 99, page 100, omitting the colloquy between counsel, 101 without the colloquy, page 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, including in this instance the colloquy, 112 including the colloquy, 113 including the colloquy again, and 114 with the colloquy, all of 115, 116, 117, 118, 119 without the colloquy, 120 without the colloquy, 121, 122 without the colloquy, 123 without the colloquy, ending with page 123. Then also the following portions of Mr. Hargreaves' testimony upon the trial of the same case on cross examination, beginning with the first question to Mr. Hargreaves on the bottom of page 207, all of 208, all of 209, all of 210, 211, 212, 213, 214, 215, 216 without colloquy, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, and the balance of his testimony on page 228. We also offer the testimony of Henry Hargreaves upon that trial beginning on the top of page 235 to the bottom of the page, and all of it from 235 to 261, inclusive, ending at the bottom of page 261.

(The testimony of Henry Hargreaves, given in the case [fol. 389] of Benjamin Segal versus Chase Securities Corporation, above referred to by page numbers, has been incorporated into Plaintiff's Exhibit A-54½, and is printed in full in this record, commencing at page 865.)

Mr. Palmer: If the court please, the defendant objects to each and every page and portion of pages and which have been offered from the so-called Segal record. We object upon each and all of the grounds which have been previously urged. We also reserve the right to object to various portions on the ground that it is not material in point of time as well as not material to the issues. We call the court's particular attention to the fact that col-

loquy of counsel has in many instances been admitted under this general offer. Now, it seems to me that well illustrates how far afield plaintiff has gone in offering this matter as a so-called admission. Colloquy of counsel, discussions of issues of this particular case, concessions which were made only for the purpose of that particular case, could have no binding effect whatsoever as an admission against this defendant corporation.

Mr. Streissguth: The colloquy of counsel is offered only for the purpose of explaining the testimony of Mr. Hargreaves. That is the only purpose of adding it and where any admissions are made generally by Mr. Jennings or Mr. Palmer, the defendant's attorney, without qualification of course we ask and offer those as admissions, but otherwise the colloquies are offered merely in explanation of Mr. Hargreaves' testimony.

Mr. Palmer: Of course I assume that the colloquy will [fol. 390] show what it is offered for and the reasons why it was given in the case.

The Court: Yes, I will rule on this later.

Mr. Streissguth: Next, your Honor, we turn to what has been referred to as the Pecora investigation. Plaintiff's Exhibit A-55 is a copy of the report of the Committee on Banking and Currency. The exhibit is certified by Mr. Halsey, the secretary of the United States Senate, who, under the United States statutes, is the custodian of these records. The report is a summary of testimony taken before the Committee and its sub-committee, commonly referred to as the Pecora investigation. The exhibit just referred to, the so-called report, contains copies of the resolution under which the hearings were held, contains a summary of the testimony, and contains copious notes and references to the complete transcript of the hearings before the Committee. We intend to offer only such portion of this report as show the authority of the Committee and reference to the matters here in issue. But we call the court's attention now to the certificate and to the fact that the first of these exhibits, which is Plaintiff's Exhibit A-55, contains a copy of the resolution. Plaintiff's Exhibit A-56, again certified by the secretary of the Senate of the United States, is a certified copy of the transcript of the hearings before the subcommittee or Committee on Banking and Currency, commonly referred to as Part 5 relating to the affairs of the Chase Securities Corporation, the defendant in this case.

[fol. 391] And the hearings cover the period beginning October 17th to October 25th, inclusive, of the year 1933. Plaintiff's Exhibit A-57 is a continuation of the transcript of the hearings, again certified by the secretary of the Senate of the United States under the seal of the United States Senate, and is a certified copy of the transcript of the hearings before this Committee relating to the affairs of the Chase Securities Corporation, and covers the testimony before the Committee, beginning October 26th, and continuing daily to November 10th, inclusive, of the year 1933.

We first, Mr. Palmer, offer Plaintiff's Exhibit A-55, which is the report, all of the title page, and all of pages 1, 2, 3 and 4, which is the so-called introductory statement, including the resolution, No. 56 of the 73rd Congress, dated April 4, 1933, and the other two resolutions that appear in this exhibit.

Mr. Palmer: That is your first offer?

Mr. Streissguth: Yes. It shows the authority of the Committee, and it is merely preliminary.

Mr. Palmer: The defendant objects to the offer on the ground that no foundation has been laid, that the matter offered is hearsay and incompetent; that the matter offered is not material to the issues, and irrelevant; that the matter offered is not in reference to or connected up with any exhibits or claim of use as secondary evidence; that it is not in any way a proper manner and method of proving an action at law, the proper method being by use of depositions. Now, when I urge as the ground of objection that no [fol. 392] foundation has been laid, I intend to include in my objection the objection that the reporter whose notes are relied upon is not produced. This printed copy is not sufficiently verified to constitute or satisfy the requirements of foundation.

The Court: It is a little bit difficult for the court to rule without knowing anything about the exhibits. I might receive them with the understanding that they be clarified and amplified, and a motion to strike later on.

Mr. Palmer All right, sir.

The Court: Unless there is something you want in the record. I am ruling in the dark here.

Mr. Palmer: Certainly. With respect to this Pan American case I think that also may be dealt with later, and its distinguishing features and qualities brought out.

The Court: Yes. Suppose I receive this with the same reservation.

Mr. Streissguth: In view of counsel's suggestion, I want to make it clear we are offering this not only as primary proof in the nature of admissions, but we are also offering it as secondary evidence in view of your refusal to produce various letters and documents which we asked for. So it is a double-barreled proposition.

Mr. Palmer: Our objections stand notwithstanding the statement of counsel.

Mr. Streissguth: Then we turn to Plaintiff's Exhibit A-56, which is part 5 of Chase Securities, and we offer the following portions of that exhibit and transcript of testimony, [fol. 393] being part of the hearings between the dates October 17th and 25th, 1935. We first offer page 2279 with reference to the appearances before the Committee at that time. Mr. Edelman has the other matters all noted, and will you please read the portions you are offering?

Mr. Palmer: Before proceeding with the reading of that, may we incorporate in our objections as a further ground that the matter offered is not the best evidence?

The Court: That may be included in the objection.

Mr. Edelman: We now read from Plaintiff's Exhibit A-56, page 2279.

"Stock Exchange Practices,

Tuesday, October 17, 1933

United States Senate,

Sub-Committee of the Committee on Banking and Currency,

Washington, D. C.

"The sub-committee met, pursuant to adjournment on Friday, October 13, 1933, at 10 A. M. in the Caucus Room of the Senate Office Building, Senator Duncan U. Fletcher presiding.

"Present: Senators Fletcher (chairman), Adams (substitute for Barkley and proxy for Costigan), Townsend, Couzens, and Goldsborough (substitute for Norbeck).

"Present also: Ferdinand Pecora, counsel to the committee; Julius Silver and David Saperstein, associate counsel to the committee; and Frank J. Meehan, chief statistician

to the committee; Martin Conboy, counsel for Albert H. [fols. 394-556] Wiggin; Eldon Bisbee, Henry Root Stern, Alfred E. Mudge, Joseph B. Lynch, Julian L. Hagen, and C. Horace Tuttle of Rushmore, Bisbee & Stern and also Albert G. Milbank, William Dean Embree, and A. Donald MacKinnon, of Milbank, Tweed, Hope & Webb, counsel for the Chase National Bank and the Chase Corporation.

"The Chairman: The sub-committee will come to order."

Reading from page 2280 of said exhibit, beginning with the statement "The Chairman."

Mr. Palmer: To this offer the defendant adds to the general objection already made that it is not connected in any way with the matter called for in the notice to produce, that the matter is irrelevant to any of the issues here, that it does not constitute in any way an admission that would be binding upon the defendant corporation.

The Court: That may be included in the objection.

[fol. 557] Mr. Streissguth: There is evidence, your Honor, in this record of a trading account subsequent to the termination of this Dominick & Dominick pool. We don't offer any part of that. We don't consider it necessary. Mr. Edelman, will you read into the record the appearances that were made before this committee on October 19, 1929, the date of the testimony that you have read this morning?

Mr. Palmer: That same list of appearances? Why can't we have it understood that portion may appear and be transcribed in the record by the reporter without the necessity of reading it?

The portion of the Pecora Committee record on page 2413 of Volume 5, investigation of the Chase Securities Corporation, is as follows:

[fol. 558] "Thursday, October 19, 1933.

"United States Senate,
"Subcommittee of the Committee on
Banking and Currency,
Washington, D. C.

"The subcommittee met, pursuant to adjournment on yesterday, at 10 a. m. in the caucus room of the Senate Office Building, Senator Duncan U. Fletcher presiding.

"Present: Senators Fletcher (chairman), Adams (substitute for Barkley and proxy for Costigan), Townsend, Couzens, and Goldsborough (substitute for Norbeck).

"Present also: Ferdinand Pecora, counsel to the committee; Julius Silver and David Saperstein, associate counsel to the committee; and Frank J. Meehan, chief statistician to the committee; Martin Conboy, counsel for Albert H. Wiggin; Eldon Bisbee, Henry Root Stern, Alfred E. Mudge, Joseph B. Lynch, Julian L. Hagen, and C. Horace Tuttle of Rushmore, Bisbee & Stern, and also Albert G. Milbank, William Dean Embree, and A. Donald MacKinnon of Milbank, Tweed, Hope & Webb, counsel for the Chase National Bank and the Chase Corporation."

Mr. Streissguth: Now, that the proof has been completed, we renew at this time, Mr. Palmer, the tender that we made during the trial of the certificates of stock, the dividends, rights and benefits that may have been received by Mrs. Donaldson, the plaintiff, with interest on dividends, rights and so forth, and offer to return all of the stock and all [fol. 559] of the rights, dividends and benefits with interest on the dividends and rights.

Mr. Palmer: The objections I previously made to the tender, may it be understood, stand as to the tender as made. It is the same identical thing.

Mr. Streissguth: We offer, your Honor, from the 1928 Volume of Moody on Banks and Finance, page 547, and the first left-hand column on page 548. I am reading from page 508 of the Vogel record. That portion of the first column, or left-hand column on page 548 which relates to the Chase National Bank of the City of New York. This exhibit gives a statement of the financial condition of the Chase National Bank as of December 31, 1927, and also as of December 31, 1928. It sets forth the capital structure, dividends paid, and the shares outstanding. And in the same connection we offer from page 548 of Moody's 1928 Volume on Banks and Finance so much of the information as relates to the Chase Securities Corporation of New York, particularly that portion which sets forth the statement of the condition of that corporation as of December 31, 1927, and as of December 31, 1926, with the capital structure and the dividends paid. All of these exhibits are material for the purpose of completing a chain of four years, a cycle of four years, to show what profits were made. Under our Blue Sky Law you can register stock by notification provided that stock has earned six per cent on the average for three years. By showing the

earnings from Moody in this manner, and the evidence already offered, we expect to convince the court that the [fol. 560] earnings of the two corporations have been less than six per cent over a period of three years.

Now, may it be stipulated, Mr. Palmer, that we may substitute, or may offer in lieu of Moody's original a photostatic copy of the pages I have referred to?

(Photostat referred to is marked Plaintiff's Exhibit A-61.)

Mr. Palmer: It may be so stipulated.

Mr. Streissguth: And subject to your objection as to materiality they may be received by the court, or whatever objection you may have. No objection to the foundation?

Mr. Palmer: I have no objection to the foundation. There is no necessity for producing the book for identification. My objections, however, which I would like to reserve, notwithstanding the stipulation, are as follows: First, that the offer is not material to the issues of this case; second, that no foundation has been laid in this sense, it is not a report made by the defendant corporation, and is therefore not binding upon the defendant corporation. It is, therefore, incompetent and hearsay so far as the defendant corporation is concerned. It constitutes but the declaration of a third person with respect to the Bank and the Securities Corporation.

Mr. Streissguth: Will you admit that Moody's is a standard publication with general circulation in the banks and other financial offices of the country?

Mr. Palmer: I will admit that.

[fol. 561] Mr. Streissguth: And that it is a standard reference work with information as to the financial structures of all corporations listed therein?

Mr. Palmer: I think I can concede that for the purposes of this case.

The plaintiff then rested.

Mr. Palmer: Will you stipulate, Mr. Streissguth, that the capital structure of the defendant and the Chase National Bank of the City of New York was in fact as stated in paragraph 7, subparagraph A of allegation XI of de-

fendant's answer at about the time the plaintiff purchased her stock?

Mr. Streissguth: It may be so stipulated.

Mr. Palmer: Will you further stipulate that subsequent to the purchase made by plaintiff the corporate structures of the Bank and the defendant corporation were changed and became such as is set forth in paragraph 7, subparagraphs B, C, D, E, F, G, H, I, J and K of our answer?

Mr. Streissguth: Your Honor, we claim that any changes in corporate structure subsequent to the purchase of this stock cannot affect the plaintiff's rights. Subject to the objection, then, that the testimony will be incompetent, irrelevant, immaterial, and not tending to establish any defense, we will stipulate the facts with reference to the change in capitalization are as set out in those paragraphs.

The Court: Do I understand that you agree that those probably were facts?

[fol. 562] Mr. Streissguth: Yes, that the changes were actually made as set out in the answer.

Mr. Palmer: The only question then, relates to the materiality of those changes?

Mr. Streissguth: That is right.

Mr. Palmer: We offer these changes in the corporate structure as facts bearing upon two defenses, first, the defense that the plaintiff cannot restore defendant to the status quo due to the changes in corporate structure by returning stock of the same character which she purchased; and, second, as bearing upon the issue of laches and ratification of the purchase.

Mr. Streissguth: Well, our objection is that it is immaterial.

The Court: I will receive it subject to the objection, and let that question be brought up later.

Mr. Palmer: Now, I am not reading all of this, your Honor; it covers several pages of our answer, but it may be understood that the reporter will transcribe these paragraphs and put them in the record?

Mr. Streissguth: There will be no objection on our part.

The portions of the answer of defendant, referred to above, are as follows:

Allegation XI, paragraph 7:

"(a) That on or about August 12, 1929 (the date of plaintiff's alleged purchase), the Bank was a national bank-

ing association organized under the banking laws of the United States of America, having a capital of eighty [fol. 563] million dollars ($80,000,000) divided into four million (4,000,000) shares of stock of a par value of twenty dollars ($20.00) per share. At or about the same time, the Chase Securities Corporation had a capital of sixty-six million seven hundred fifty thousand dollars ($66,750,000) represented by four million (4,000,000) shares without par value.

"(b) On or about August 14, 1929, the number of shares of stock of Chase Securities Corporation was increased to five million two hundred fifty thousand (5,250,000) shares without par value.

"(c) On or about August 23, 1929, the capital of Chase Securities Corporation was further increased to sixty-nine million two hundred fifty thousand dollars ($69,250,000), and on or about August 24, 1929, said capital was further increased to seventy-three million dollars ($73,000,000).

"(d) On or about August 24, 1929, the capital of the Bank was increased to one hundred five million dollars ($105,000,000) and one million two hundred fifty thousand (1,250,000) additional shares of the par value of twenty dollars ($20.00) each were issued, thereby increasing the number of shares of stock of the bank to five million two hundred fifty thousand (5,250,000).

"(e) On or about May 31, 1930, the Equitable Trust Company of New York, and the Interstate Trust Company of New York, merged and consolidated with the Bank and the capital of the Bank was increased to one hundred forty-eight million dollars ($148,000,000) and the number of shares of stock was increased to seven million four hun- [fol. 564] dred thousand (7,400,000) of the same par value. At or about the same time changes were made in said Chase Securities Corporation, its capital being increased to ninety-five million dollars ($95,000,000) and the number of shares increased to seven million four hundred thousand (7,400,000) without par value.

"(f) On or about January 14, 1932, the capital of said Chase Securities Corporation was reduced to forty million dollars ($40,000,000) without changing the number of shares outstanding.

"(g) On or about January 11, 1933, the capital of said Chase Securities Corporation was reduced to thirty-seven million dollars ($37,000,000) and the shares of stock were changed from shares without par value to shares of the par value of five dollars ($5.00) each.

"(h) On or about May 17, 1933, the Certificate of Incorporation of defendant was duly amended so as to provide that after May 16, 1933, defendant should not, either directly or indirectly through any subsidiary, engage in the business of issuing, floating, underwriting, publicly selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes or other securities, provided that such limitation should not preclude defendant from selling, liquidating or otherwise realizing upon any investment theretofore made. Thereupon the defendant became, and still is, a holding and liquidating company only. The par value of defendant's shares was at the same time reduced from five dollars ($5.00) to [fol. 565] one dollar ($1.00) per share and the capital of defendant was reduced from thirty-seven million dollars ($37,000,000) to seven million four hundred thousand dollars ($7,400,000) and the name of the corporation was changed from 'Chase Securities Corporation' to 'The Chase Corporation.'

"(i) On or about March 15, 1934, the capital of the Bank was increased to one hundred fifty million two hundred seventy thousand dollars ($150,270,000) which was accomplished by decreasing the then capital from one hundred forty-eight million dollars ($148,000,000) to one hundred million two hundred seventy thousand dollars ($100,270,000) par value of common stock, by reducing the par value of the outstanding shares of common stock from twenty dollars ($20.00) to thirteen dollars and fifty-five cents ($13.55) each, and increasing the capital by the issuance of fifty million dollars ($50,000,000) of five percent (5%) cumulative preferred stock divided into two million five hundred thousand (2,500,000) shares at the par value of twenty dollars ($20.00) per share. That in connection with the authorization of the issuance of said preferred stock, the Articles of Association of the Bank were amended to provide, among other things, as follows: The holders of preferred stock were not to be liable for assessments to restore impairments in capital and were entitled to receive, in preference to the

holders of common stock, cumulative dividends out of net profits of the Bank at the rate of 5% per annum. The holders of preferred stock were entitled to the benefit of the [fol. 566] provisions of a sinking fund for the retirement of the preferred stock at stated intervals. Each holder of preferred stock as well as of common stock was entitled to one vote for each share of stock, except that cumulative voting for directors was permitted. In case two dividend payments on the preferred stock should be in arrears or there should be default in the sinking fund provisions, the holders of preferred stock as a class were entitled to vote twice the number of votes to which the holders of common stock as a class were at the time entitled. In the event of liquidation the holders of preferred stock were entitled to priority in payment of the par value of said stock plus accrued dividends.

"(j) On or about June 15, 1934, the affiliation between the Bank and said The Chase Corporation was terminated by the amendment of the Certificate of Incorporation of said The Chase Corporation eliminating the provision requiring shareholders of said The Chase Corporation to be shareholders of Bank and forbidding transfer of shares of stock of said The Chase Corporation without at the same time transferring to the same person an equal number of shares of stock of the Bank. On or about said date said agreement of March 21, 1917, entered into by and between the stockholders of the Bank as aforesaid, was terminated. At the same time the par value of each share of stock of said The Chase Corporation was increased from one dollar ($1.00) to ten dollars ($10.00) and the number of shares outstanding [fol. 567] was reduced from seven million four hundred thousand (7,400,000) to seven hunderd forty thousand (740,000) and the name of the defendant was changed from 'The Chase Corporation' to 'Amerex Holding Corporation.'

"(k) The preferred stock was called for redemption on August 1, 1936, with the option to the preferred stockholders of securing redemption of said stock at any time after June 17, 1936.

"That the changes described in the above paragraphs number (b) to (j), both inclusive, excepting (c) were in each case approved at and accomplished after a meeting of stockholders of the corporation involved in the change, called for such purpose, notice of which meeting and of the proposed

changes was in each case given to all stockholders of the corporation involved, including the plaintiff herein as long as the plaintiff continued to be a stockholder of record. That plaintiff had full opportunity to appear at said meetings in person or by proxy and vote for or against said proposals or otherwise register approval or disapproval thereof."

Mr. Palmer: Now, if the court please, there have been marked for identification Defendant's Exhibits 16-A through to 16-T, inclusive. These exhibits consist of proxies, notices sent to stockholders, form letters and form agreements addressed generally to the stockholders of Chase National Bank and Chase Securities Corporation, or The Chase Corporation and the Amerex Holding Cor-
[fol. 568] poration, as the case may be. Will you stipulate, Mr. Streissguth, that these various notices, letters, proxies and the like were received by the plaintiff in this case?

Mr. Streissguth: I will concede that for the purpose of counsel's offer.

Mr. Palmer: If the court please, I would like to call attention very briefly and in a general way to what the last exhibits relate. You will recall that we stipulated a few moments ago to certain corporate changes in the corporate structure of the Bank and the Securities Corporation. These various corporate changes were taken after action on the part of the stockholders at stockholders' meetings. I say this, that in the main the changes were made after authority was duly granted by the stockholders in their meetings. These various notices, proxies and the like are all connected up with those various corporate changes about which we have stipulated, and they are offered for the purpose of showing that in the case of each change the change was made known to the plaintiff through the form of these notices, letters, proxies and the like. They were not only made known to her, but she was, presumably, on receipt of these documents acquainted with the action which the corporation was about to take, and by not taking any affirmative action herself is deemed to have acquiesced in the action taken by the respective corporations.

Mr. Streissguth: Now, your Honor, this same defense was offered by this defendant in the case which went up to the United States Supreme Court, the case of The Com-
[fol. 569] missioner of Banks of the State of Massachu-

setts vs. The Chase Securities Corporation, reported in 10 N. E. 2nd, and also in the Law Edition of the U. S. Reports for December, 1937. It is there definitely held that these changes in corporate structure and acquiescence therein by a purchaser of stock does not constitute any estoppel or any defense of any kind, and that is our position here. We have no objection to the foundation for these exhibits, but we do object to the offer, if they are offered in evidence, on the ground that the offers are incompetent, that they are immaterial, and they do not tend to establish any defense.

Mr. Palmer: If the court please, in the first place, that Commissioner of Banks case, to which counsel has referred, was a straight Blue Sky action. It was brought before the statute of limitations ran.

The Court: I think I will receive them and take up the question of materiality later; Exhibits 16-A to 16-T, inclusive.

Mr. Palmer: Defendant would like to rest provisionally at this time, your Honor. My request to rest provisionally is due to the fact that I would like to have an opportunity to consider the stipulations that we entered into this morning with respect to the subpoena of Mr. Hargreaves in the Segal record, and the subpoena of Mr. Wiggin in the Senate record. I would also like to rest provisionally for the purpose of considering the necessity of making certain changes and corrections in the record itself. I would like [fol. 570] to have an opportunity to look over the record further and determine whether certain changes need to be made.

The Court: You can do that at 2 o'clock.

Mr. Palmer: Yes.

Recess until 2 P. M.

Afternoon session.

Mr. Palmer: If the court please, with reference to page 226, at the top of the page, of the record in this case, I made a statement about a stamp which appeared on one or two of the exhibits produced. The stamp in question was "File Department of the Chase Corporation." Now, I would like to correct my statement, as follows, about that stamp:

Mr. Streissguth: I have no objection.

Mr. Palmer: "It was used at the time of the Senate investigation by the witnesses, not the Committee, to identify

Chase and Metpotan records from those of other parties presented at the hearing. A paper so marked would be returned to Chase, which in turn would file the paper in its own files if it were a Chase record, or would return it to the Metpotan files if it were a record of that corporation. It was not a Committee stamp." I understand you have no objection to that correction.

Mr. Palmer: Now, your Honor, technically, I suppose, the defendant ought to make its motions to strike before resting its case. However, upon the suggestion of the court, and I think it is a wise one, under the circumstances may it be understood that the motions to strike may be made at the conclusion of arguments?

[fols. 571-583] The Court: There is no objection on the part of the court.

Mr. Streissguth: There is none on my part.

Mr. Palmer: Then, I assume that the case should remain open for the purpose of hearing those motions to strike.

The Court: That completes the testimony?

Mr. Streissguth: Yes. You have rested, John?

Mr. Palmer: Yes.

Mr. Streissguth: With the understanding this Moody exhibit may be inserted as a part of the plaintiff's case?

Mr. Palmer: That is right.

The case was then argued to the court by counsel for the respective parties.

[fol. 584] In District Court of Hennepin County

Certificate

The above entitled matter came duly on for hearing before the undersigned on May 5, 1941, at 9:30 o'clock in the forenoon thereof, in chambers in the court house in the city of Minneapolis, above county and state, pursuant to Notice of Proposal to Settled Case. The matter having been duly considered and the parties hereto having entered into a formal stipulation settling the case herein as hereinafter set forth, I hereby certify that the foregoing case, [fols. 585-1060] comprising the foregoing transcript consisting of 475 typewritten pages, together with plaintiff's Exhibit A-54½ (transcript of portions of testimony of Henry Hargreaves at the trial of the case of Benjamin

Segal v. Chase Securities Corporation in Hennepin County District Court), and the several exhibits offered or received in evidence upon the trial hereof as set forth in the index of exhibits attached to said transcript, and the stipulation in reference to Plaintiff's Exhibits A-56 and A-57 dated May 17, 1939, also attached to said transcript, which exhibits may be considered attached to said transcript by reference, have been examined by me and found conformable to the truth and to contain all the evidence offered or introduced at the trial of this cause, and also all objections, rulings, orders, stipulations and other proceedings upon such trial; and I hereby settle and allow the same as the settled case herein.

Dated: May 14, 1941.

By the Court: W. W. Bardwell, Judge.

[fol. 1061] In District Court of Hennepin County

Notice of Entry of Findings

To defendant above named, and to Messrs. Stinchfield, Mackall, Crounse, McNally & Moore and Frederick H. Stinchfield and John M. Palmer, its attorneys:

You will please take notice that on April 18, 1940, the above court made and filed its findings of fact, conclusions of law, and order for judgment in the above entitled action, copy of which is herewith served upon you, with stay of 40 days.

Dated April 18, 1940.

Leonard, Street & Deinard, Attorneys for Plaintiff, 1036 Andrus Building, Minneapolis, Minnesota.

In District Court of Hennepin County

Findings of Fact, Conclusions of Law, Order for Judgment

The above entitled case being regularly on the general term calendar of the above court, came on for trial on May 9, 1939, before the undersigned, one of the judges of the

above court, and was tried, without a jury, on said day and on May 10, 11, 12, June 1, 2, and 10, 1939. T. O. Streissguth, and Messrs. Leonard, Street & Deinard by Hyman Edelman, appeared on behalf of plaintiff, and Messrs. Stinchfield, Mackall, Crounse, McNally & Moore, by Frederick H. Stinchfield and John M. Palmer, appeared on behalf of [fol. 1062] defendant. After the conclusion of the trial written briefs were submitted by the parties. The court having heard the testimony, and being duly advised in the premises hereby makes the following:

Findings of Fact

I

At all times herein mentioned plaintiff was, and now is, a resident of the city of Minneapolis, Hennepin County, state of Minnesota.

II

The Chase National Bank of the City of New York (hereinafter called "the bank") at all time herein mentioned was and now is a national banking association, organized under the provisions of the Act of Congress commonly known as the National Banking Act, and engaged in the banking business, with its banking houses and offices located and its general business conducted, in the city of New York, state of New York. On March 21, 1917, the bank was capitalized at $10,000,000, consisting of 100,000 shares of stock of the par value of $100.00 each.

III

Defendant (sometimes hereinafter called "the corporation") was organized under the Business Corporation Law of New York on May 26, 1917, and ever since has been and now is a New York corporation. The significant fea- [fol. 1063] tures of its charter will be summarized. The powers conferred on the corporation are comprehensive in scope, including authority to deal in securities. The amount of its capital was fixed at $2,500,000; no-par value shares to the number of 100,000 were to be issued; and the consideration for which it might issue and sell these shares was fixed at $25.00 a share. No share of its stock, issued to the bank's stockholders, nor any interest therein,

should "be sold, pledged, or otherwise disposed of or transferred, either voluntarily, by operation of law or otherwise, except in each instance and from time to time together with a transfer to the same person or persons of a like interest in an equal number of shares of stock of said bank. The sale, pledge or other disposition or transfer of any shares of stock of the bank or any interest therein, either voluntarily, by operation of law or otherwise, by or in behalf of any such stockholder of the bank or anyone claiming from or through such stockholder, either directly or by mesne transfers shall, if and to the extent that effect may then be given by law to this provision, operate ipso facto as a transfer to the same person or persons of a like interest in an equal number of shares of the stock of this corporation." All persons receiving shares of its stock as stockholders of the bank, and those claiming under or through them, should irrevocably designate and appoint the "depositary with which shares of this corporation and of the bank are deposited to insure their transfer together * * * their agent, in case of the sale, pledge, or other [fol. 1064] disposition or transfer of a share or shares of said stock of the bank or of this corporation, or any interest therein, * * * to transfer to the same person or persons a like interest in an equal number of shares of this corporation or of the bank, as the case may be, and to do and perform any and all acts to effectuate such transfer." The foregoing provisions might be modified or terminated by the affirmative action of the registered holders of at least seventy-five per cent (later reduced to 66 2/3) of the shares of stock of the bank and of the corporation then outstanding and so deposited. The foregoing provisions should be stated in the certificates of stock of the corporation.

IV

The mechanics of arranging the affiliation between the bank and the corporation, contemplated by its charter, will be summarized.

Before organization of the corporation, an agreement (herein called "the deposit agreement") dated March 21, 1917, had been entered into between all the bank stockholders, a committee of such stockholders (herein called the "committee") and Bankers Trust Company of New York. Pursuant to the terms of the deposit

agreement the bank stockholders deposited all of their certificates with the committee. The bank paid a special dividend of $25.00 a share, aggregating $2,500,000, which the committee received. The committee organized the corporation, and used the fund of $2,500,000 to pay the corporation for the 100,000 shares of its stock. Stock certificates [fol. 1065] of the corporation were issued in the names of the depositing bank stockholders for the same number of shares as their bank stock. These certificates were deposited with Bankers Trust Company along with the shares of the bank stock which the committee had been holding; Bankers Trust Company took them as depositary for the committee. As occasion called for the transfer of shares, new certificates would be issued, but these new certificates were printed on a single sheet, on one half a certificate for shares of the bank stock, and on the other half a certificate for shares of the corporation stock, and on the reverse side of the sheet were the usual printed forms for the transfer thereof. Bankers Trust Company issued to the depositing bank stockholders receipts for their stock in the bank and the corporation, pursuant to the terms of the deposit agreement.

These receipts contained the following provision with reference to the deposited shares: "Neither said shares of the bank nor said shares of the Securities Corporation are transferable separately, but this receipt and all rights and interests represented hereby are transferable by the registered holder, either in person or by attorney duly authorized on the books of the Depositary kept for that purpose, upon surrender of this receipt duly assigned, which assignment shall transfer all right, title and interest of the Depositor in the Deposited Shares. By delivering this receipt to the Depositary for transfer the holder hereof irrevocably constitutes and appoints the Depositary attorney [fol. 1066] to surrender the certificates for the Deposited Shares and to receive from the Bank and from the Securities Corporation respectively in exchange therefor certificates of stock for the Deposited Shares registered in the name of the transferee hereof as entered upon the records of the Depositary, and hereby irrevocably authorizes the Depositary to hold the same subject to the provisions of the Deposit Agreement."

The receipts contained a printed form for the joint transfer of the deposited shares of stock of the bank and of the

corporation represented by the receipts, and an irrevocable appointment of Bankers Trust Company as attorney for the person named in the receipt, to transfer the certificates for the deposited shares. The form included also a transfer of the receipt "and all rights and interests represented thereby."

By the provisions of defendant's charter and the deposit agreement, the shares represented by the receipts were linked together for sale and holding in such manner as to make the shares in one corporation non-transferable separately, and to make the ownership, sale, purchase, or transfer of shares in one corporation absolutely conditioned upon identical ownership, sale, purchase or transfer of shares of the other.

After the initial deposit, when the capital stock of the bank was increased from time to time, an equal number of additional shares would be authorized and issued by the corporation, and certificates for the new bank shares and [fol. 1067] the new corporation shares deposited with Bankers Trust Company, and receipts therefor issued to the persons entitled thereto.

V

The mechanics of issuance and transfer of Bankers Trust Company receipts will be summarized.

Between 1917 and January, 1930, certificates of shares of the bank and of the corporation issued in the names of the persons designated in the outstanding Bankers Trust Company receipts were at all times in the custody of Bankers Trust Company in New York City. When an outstanding receipt was transferred, and surrendered by the transferee to Bankers Trust Company, the certificate for the shares of the bank and of the corporation represented by the surrendered receipt would be transferred by Bankers Trust Company under the power contained in the deposit agreement, to the transferee of the receipt, and a certificate for the shares of the bank and of the corporation would be issued in the name of the transferee and deposited with Bankers Trust Company, which would in turn issue to the transferee a new receipt therefor in the form already described. The receipt-holders, in whose names the deposited shares stood were at all times recognized by the bank and by the corporation as their respective stockholders

of record, entitled to vote the same, and to receive all dividends declared thereon.

[fol. 1068]

VI

By an agreement dated January 15, 1930, between Bankers Trust Company and the receipt-holders, designed to eliminate the expense incident to the use of such receipts, provision was made for the withdrawal of the receipts and the substitution of new "duplex" certificates to be issued by the bank and by the corporation to their stockholders. These duplex certificates were likewise printed on a single sheet, on one side a certificate for shares of the bank stock, on the other side a certificate for an equal number of shares of the corporation stock, each certificate bearing a legend restricting the holder from selling, pledging or otherwise disposing or transferring, "any share or interest therein in either corporation without at the same time transferring to or vesting in the same party an equal number of shares, or the same interest therein, in the other," and with one printed form for joint transfer. Thereafter the Bankers Trust Company receipts were retired, and in place thereof each stockholder received a new "duplex" certificate for the shares of the bank and of the corporation represented by the receipt.

Hereinafter for brevity, both the Bankers Trust Company receipts and the "duplex" certificates, will be called "Chase units."

VII

Defendant was organized and its stock inextricably bound up with the stock of the bank, as has been described, at the [fol. 1069] instance of the bank, its officers and shareholders acting as such, for the purpose of enabling the bank and its stockholders to engage in business and stock operations, and to buy, hold, or sell its own capital stock.

VIII

By amendment of its articles of incorporation, defendant's corporate name was changed from Chase Securities Corporation to "The Chase Corporation" in the year 1933. Thereafter, in the year 1934, its corporate name was again changed from the Chase Corporation to "Amerex Holding Corporation," which name ever since has been and still is its corporate name.

IX

On March 22, 1928, pursuant to application made by it, defendant secured a broker's license issued to it by the Securities Division of the Department of Commerce of Minnesota, commonly known as the "Commission," under and in accordance with the provisions of Chapter 192, Session Laws of Minnesota for 1925, as amended, commonly known as the "Blue Sky Law." By successive annual applications defendant secured renewal broker's licenses for succeeding years. Said licenses authorized it to transact a lawful securities business as a broker within the state of Minnesota, subject to the provisions of said law, for annual license periods ending March 21, 1929, 1930, 1931 and 1932.

Defendant, pursuant to the requirements of Section 3996-11, Mason's Minnesota Statutes, 1927, before being so [fol. 1070] licensed, and on March 17, 1928, appointed the Commissioner of Securities of Minnesota and his successor in office, its attorney for the service of process in any action or proceeding against it, in relation to or involving any transaction covered by said "Blue Sky Law."

X

During the year 1928 defendant as such licensed broker appointed eight persons as its agents in Minnesota, and procured agent's licenses for them from the Commission.

During the year 1929, defendant procured the renewal of seven of said eight licenses and one additional agent's license, and thereafter by successive annual applications procured renewal agent's licenses for succeeding years. During 1928, 1929 and 1930, its licensed agents were authorized to sell, offer for sale and solicit the sale of lawful securities on its behalf within the state of Minnesota.

XI

Defendant was also licensed as a foreign corporation on June 5, 1930, to do business in Minnesota, and continued so to be licensed until it filed a resolution of withdrawal on June 30, 1931, under and pursuant to Section 7494, Mason's Minnesota Statutes, 1927. Upon filing said resolution of withdrawal defendant appointed the Secretary of State its agent for service of process "in any action or proceeding of any nature or kind arising out of or involving any

[fol. 1071] thing done or omitted by said foreign corporation in this state while licensed to do business here."

XII

From March, 1928, until July, 1931, defendant maintained offices within the state of Minnesota, fully staffed and equipped with furniture, supplies, and wire system, and was actually and continuously present and resident in the state of Minnesota, and doing business therein, and was engaged in the securities business therein, including the sale of stocks, shares, bonds, debentures and other securities directly and through its agents, in the course of continued and successive sales, and in the business of purchasing and acquiring directly and through its agents, securities for the purpose of reselling the same to others, and generally of buying, selling, otherwise dealing or trading in, promoting, negotiating, advertising and distributing such securities, under said broker's license, and defendant's agents were representing it in the state of Minnesota, and were engaged therein on its behalf in the selling, offering for sale and solicitation of the sale of securities.

As a part of its said business in the state of Minnesota, defendant was, during the entire year 1929, and for some time thereafter, engaged in the sale and disposition for value, offering for sale, and solicitation of the sale of Chase units, then in the form of Bankers Trust Company receipts.

[fol. 1072] XIII

On or about August 8, 1929, at Minneapolis, Minnesota, defendant through one Wier Jepson, its agent duly authorized by it, solicited plaintiff to purchase and offered to and did sell to plaintiff, eight Chase units, at a single indivisible purchase price of $1,828.00, which plaintiff paid to defendant at Minneapolis on August 23, 1929. Bankers Trust Company's receipt, dated on or about September 9, 1929 (which was received in evidence as Plaintiff's Exhibit L) evidencing said eight Chase units was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about September 10, 1929.

Following the delivery of said receipt, a similar receipt, dated February 3, 1930 (which was received in evidence as Plaintiff's Exhibit M) for one Chase unit, was delivered

to and received by plaintiff at Minneapolis, Minnesota, on or about February 3, 1930. This receipt represented a stock dividend of 12½% declared by defendant and the bank upon merger with National Park Bank, to all their stockholders of record as of August 23, 1929.

XIV

On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Co npany receipt, a duplex certificate for nine units, No. F-52498, which was offered and received in evidence as Plaintiff's Exhibit N.

On August 12, 1936, defendant issued to plaintiff, in exchange for said duplex certificates, two certificates, one [fol. 1073] for nine shares of bank stock, being certificate No. 170 762, which was offered and received in evidence as Plaintiff's Exhibit P, the other a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to defendant of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067 711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

XV

By the provisions of said Blue Sky Law, Chase units were required to have been registered as therein provided, before being offered for sale or sold within the state of Minnesota. Defendant, in violation and contravention of said law and the duties imposed upon it, wilfully failed to register the Chase units according to the requirements of said law, and the Chase units were never registered or licensed to be sold in Minnesota, and the sale thereof was never authorized in Minnesota by registration under said law. The Chase units never were within any of the classifications of securities exempted from registration under Section 3996-2 of Chapter 21-B, Mason's Minnesota Statues, 1927, and were never exempted from the operation of the provisions of said law, and the sale thereof was never authorized in Minnesota by exemption from said law. The sale of Chase units to plaintiff was not within any of the classifications of exempted sales specified in Section 3996-3 [fol. 1074] of said chapter, and was not in fact excepted from the operation c said law, nor authorized by any pro-

vision of law. Said sale to plaintiff was not an isolated sale, but was made in the course of repeated and successive sales of Chase units by defendant, which was, at the time of said sale, offering Chase units for sale, soliciting the sale thereof, and selling the same to the public generally. Defendant never applied to the Commission for the registration of Chase units or of its own capital stock, nor did it ever notify said Commission of its intention to sell Chase units or its own capital stock, and it never in fact at any time secured the license or approval of said Commission to sell, offer to sell, solicit the sale of, or attempt to sell, or negotiate or dispose of Chase units or its own capital stock.

Defendant, at all times mentioned herein, knew and was familiar with the requirements of said Blue Sky Law and wilfully failed to register the Chase units or its own stock.

For a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the Commission to enable it to determine whether said securities should be registered and to properly pass on an application for registration, and, with such knowledge, at- [fol. 1075] tempted to evade the law requiring Chase units to be registered and licensed.

XVI

By the provisions of said Blue Sky Law, defendant's agents were forbidden to sell or offer for sale any securities within the state of Minnesota unless and until such agents had received agent's licenses from the Commission in accordance with the provisions of said law. At the time of said transaction with plaintiff, defendant's agent, Wier Jepson, had not been licensed as an agent by the Commission. Defendant at no time filed with the Commission any appointment or designation of said Wier Jepson as its agent, and never obtained from the Commission any agent's license for him, but wilfully and knowingly authorized and permitted said Wier Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others

in the state of Minnesota in the course of successive and repeated sales thereof within the state of Minnesota.

XVII

The sale by defendant through its unlicensed agent to plaintiff of said unregistered Chase units was made in Minnesota, in violation of the provisions of said Blue Sky Law and was illegal, and void, and incapable of ratification or confirmation as between the original parties to the sale. Because of the linking together of shares of bank stock and shares of the corporation's stock, and because an entire, indivisible purchase price was required to be paid and was [fol. 1076] paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was wholly illegal and wholly void.

XVIII

Plaintiff, in purchasing said Chase units, believed that they were legally sold and delivered to her, that defendant had complied with said Blue Sky Law, and that defendant's said agent, Wier Jepson, was duly licensed and authorized to sell Chase units to her, and relied thereon, and despite the exercise of due diligence on her part, did not discover that the Chase units were not registered, and that they were sold to her by an unlicensed agent, and that said sale was illegal and void, until on or about October 1, 1937.

XIX

Promptly upon discovery of the illegality of said sale, and on or about October 11, 1937, plaintiff formally repudiated said transaction and demanded a refund and return to her of the purchase price thereof, with interest, and tendered to defendant her certificates of stock, together with dividends and other income received by plaintiff therefrom, with interest. Defendant rejected said tender and refused to recognize plaintiff's repudiation of said transaction. In her complaint in this action and upon the trial, plaintiff renewed her tender and it was again refused by defendant. Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were [fol. 1077] refused by defendant. It would have been a

vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest.

XX

Plaintiff from time to time before said discovery, as well as after said tenders and refusals thereof, received and accepted dividends upon said stock, as follows:

Dividends on Chase Units:

October 1, 1929	$8.00	
January 1, 1930	8.00	
April 1, 1930	9.00	
July 1, 1930	9.00	
October 1, 1930	9.00	
January 2, 1931	9.00	
April 1, 1931	9.00	
July 1, 1931	9.00	
October 1, 1931	9.00	
January 2, 1932	9.00	
April 1, 1932	6.75	
[fol. 1078]		
July 1, 1932	4.50	
October 1, 1932	4.50	
January 2, 1933	4.50	
April 1, 1933	4.50	
July 1, 1933	3.15	
October 1, 1933	2.99	
January 2, 1934	2.99	
April 1, 1934	3.15	
August 1, 1934	4.23	
February 2, 1935	6.30	
August 1, 1935	6.30	
February 1, 1936	6.30	$148.16

Dividends on Chase National Bank Stock:

August 1, 1936	$6.30	
February 1, 1937	6.30	
August 1, 1937	6.30	
February 1, 1938	6.30	
August 1, 1938	6.30	
February 1, 1939	6.30	$ 37.80

Dividends on Amerex Holding Corporation Stock:

July 15, 1936	$ .50	
February 1, 1937	.50	
August 1, 1937	.50	
February 1, 1938	.70	
August 1, 1938	.70	
February 1, 1939	.70	$ 3.60

The total of the dividends so received up to and including June 10, 1939, was $189.56.

[fol. 1079]

XXI

By reason of the illegality and invalidity of said sale, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together with interest thereon at the rate of six per cent per annum from and after August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof.

XXII

On or about the 30th day of June, 1931, defendant filed a resolution of its withdrawal from the state of Minnesota and in connection therewith appointed the Secretary of State its agent for service in actions arising out of anything done or omitted to be done by it while licensed to do business within the state. Shortly thereafter and on or about July 7, 1931, defendant advised and notified the Commissioner of Securities of the state of Minnesota that it had ceased to transact business within the state, and requested the cancellation of its license as a broker, and of all outstanding licenses of its agents, and then and there

surrendered all license cards theretofore issued to it and its agents. On or about said date the Commission duly made and entered its order cancelling all licenses of defendant and its agents, and terminating the right of defendand to solicit the sale or to sell or offer to sell securities in the state of Minnesota.

At or about the same time defendant closed its offices within the state of Minnesota, discharged all of its employees, removed and disposed of all its furniture, property [fol. 1080] and securities within the state, disconnected its wire system and ceased entirely to do business of any kind within the state of Minnesota. Defendant has not transacted any business whatsoever in the state of Minnesota since said time.

On or about said 7th day of July, 1931, the defendant departed from the state of Minnesota and has at all times since said date resided outside of the state of Minnesota and at no time thereafter has defendant been present within the state of Minnesota or returned thereto.

XXIII

The summons and complaint in this action were duly served upon the defendant and this action commenced on November 22, 1937, and within the time limited by the statutes of the state of Minnesota for the commencement of such action.

XXIV

Subsequent to the time plaintiff purchased the said Chase units, there were numerous changes in the capitalization of the bank and of defendant, as set forth in paragraph XI, subdivision 8, of defendant's answer. Such changes were not confined to the individual shares sold to plaintiff, but affected all of the capital stock of both corporations. The changes resulted from action of the bank and/or defendant or their respective stockholders in the course of the operation of the bank or defendant. They could be made without the consent of the owners of any particular [fol. 1081] shares. Plaintiff from time to time was advised of such changes, but she did not actively participate therein, except as she acted as a stockholder before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the

sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing.

XXV

Except as hereinbefore specifically found, the court finds the allegations of defendant's answer not true and not sustained by the evidence.

XXVI

The court finds it unnecessary to make findings on the claims of actual fraud, implied fraud, and fraud by suppression of material facts, presented by the complaint, inasmuch as the court has allowed recovery on a ground independent of said claims.

As

Conclusions of Law

the court finds that:

[fol. 1082] I

Plaintiff is entitled to judgment against defendant in the sum of $1,828.00, plus interest thereon, at the rate of six per cent per annum from August 23, 1929, less the sum of $189.56 (the total of dividends received by plaintiffs from defendant), together with interest on each dividend item at the rate of six per cent per annum from the date of receipt thereof by plaintiff (said dividends and dates of receipt thereof by plaintiff are set forth in paragraph XX of the foregoing findings of fact), together with her costs and disbursements herein.

II

Upon satisfaction by defendant of said judgment, plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, certificate No. 170 762 for 9 shares of common stock in Chase National Bank of the City of New York, and certificate No. 067,711 for 1 share of com-

mon stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificates shall, upon execution of proper receipt therefor, be delivered to defendant.

Let judgment be entered accordingly.

Dated April 18, 1940.

By the Court, W. W. Bardwell, Judge.

Forty days stay.

[fol. 1083] In District Court of Hennepin County

Order to Show Cause

Upon the files, records and proceedings herein, and upon the affidavit of John M. Palmer, one of counsel for defendant, from which it appears that an exigency exists for shortening the time for hearing on defendant's hereinafter described motion, it is hereby

Ordered that plaintiff show cause at the court house of Hennepin County, Minneapolis, Minnesota, on the 2nd day of May, 1940, at 10 in the forenoon of said day, before the Honorable W. W. Bardwell, one of the judges of said court, in chambers, why the motion of defendant to amend the findings of fact, conclusions of law and order for judgment, or in the alternative for a new trial, should not be granted;

And it is further ordered that two copies of the aforementioned order to show cause be served on Leonard, Street & Deinard, one of counsel for plaintiff, not later than April 23, 1940.

Dated April 23, 1940.

W. W. Bardwell, Judge.

In District Court of Hennepin County

Affidavit of John M. Palmer

John M. Palmer, being first duly sworn, on oath, deposes and says:

That he is an attorney at law, having been duly admitted [fol. 1084] to practice in the year 1931; and that he is

one of counsel associated with Stinchfield, Mackall, Crounse & Moore, attorneys for defendant.

That there is pending in the Circuit Court of Appeals of the Eighth Circuit a judgment against this defendant in an action entitled Chase Securities Corporation v. Joseph H. Vogel, which is in all material respects similar to the action pending in this court. That it is the intention of the defendant to petition the United States Supreme Court for a writ of certiorari in said cause, and defendant has applied for a stay of sending down of the mandate from the Circuit Court to the District Court. That under the rules of the Circuit Court the stay of mandate will be granted for a period not to exceed thirty days from the final judgment or decision of the Circuit Court, and that said time will expire on or about May 17, 1940. That as a consequence, defendant must make every effort possible to prepare and docket in the Supreme Court its petition, brief and certified transcript within the time allowed by the stay of mandate.

That the said decision of the Circuit Court of Appeals and the decision in the case at bar are based on the construction of the tolling statute (§9200, Mason's Minn. Stat. 1927) of the state of Minnesota. Under the practice and authority indicated in Michalek v. United States Gypsum Co., 298 U. S. 639, 56 S. Ct. 679, 80 L. Ed. 1372; American Surety Co. v. Baldwin, 287 U. S. 156, 163, 53 S. Ct. 98, 77 L. Ed. 231, 236; see Robertson and Kirkham on "Jurisdic-
[fol. 1085] tion of the Supreme Court of the United States," pp. 559, 560, it appears fit and proper that the question be first passed upon by the Supreme Court of Minnesota before the United States Supreme Court be called upon to act on the petition for certiorari. To that end it is the desire of counsel for defendant to be able to say in the petition for certiorari that the case at bar is on its way by appeal to the Supreme Court of Minnesota, and that an early determination by the Minnesota court is being sought.

That by reason of the shortness of time for the preparation of the petition, brief and record on certiorari, affiant respectfully submits that an exigency exists which justifies the shortening of the time for hearing on the motion for amended findings of new trial, said motion being essential to preserve its constitutional points and to get the record

in shape for appeal to the Supreme Court of Minnesota. Further, affiant sayeth not.

John M. Palmer.

Subscribed and sworn to before me this 23rd day of April, 1940. J. T. Gallager, Notary Public, Hennepin County, Minn. My commission expires November 29, 1941. (Notarial Seal.)

[fol. 1086] In District Court of Hennepin County

Notice of Motion of Defendant to Amend the Findings of Fact, Conclusions of Law and Order for Judgment, or in the Alternative for a New Trial

To T. O. Streissguth, Esquire, and Messrs. Leonard, Street & Deinard, attorneys for plaintiff:

Please take notice: That at the time and place fixed in the order to show cause hereto attached, defendant will move the court to amend the findings of fact, conclusions of law and order for judgment, or in the event said motion is denied, for a new trial upon all of the grounds and for the reasons set forth as to the following:

Motion to Amend the Findings of Fact, Conclusions of Law and Order for Judgment

Defendant will move to amend the findings of fact, as follows:

1

By striking out the words "wilful" or "wilfully" wherever they appear in finding numbered XV, and by striking out the last paragraph of said finding which reads as follows:

"For a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register [fol. 1087] the Chase units in Minnesota, it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the

Commission to enable it to determine whether said securities should be registered and to properly pass on an application for registration, and, with such knowledge, attempted to evade the law requiring Chase units to be registered and licensed."

2

By striking out the finding numbered XVIII which in substance reads that plaintiff believed that the Chase units were legally sold to her, and that she did not discover the illegality until October 1, 1937; by striking out so much of the first line of finding XIX as reads: "Promptly upon discovery of the illegality of said sale, * * *"; and by striking out the words "said discovery" appearing in the first line of finding numbered XX.

3

By striking out the word "wilfully" where it appears in finding numbered XVI, and the last five lines of said finding which read as follows:

"* * * But wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others in the state of Minnesota in the course of successive and repeated sales thereof within the state of Minnesota."

[fol. 1088] 4

By striking out the phrase "and fraud" appearing in the eleventh and twelfth lines from the top line of finding numbered XXIV.

The aforementioned part of defendant's motion to strike will be based upon the ground that the aforementioned findings are contrary to the court's finding numbered XXVI, wherein the court says that it is unnecessary to make findings on the claims of actual fraud, implied fraud, and fraud by suppression of material facts presented by the complaint. That the findings and portions of findings which defendant moves to strike are relevant to and tend to establish the implied fraud claim set forth in the complaint, and are in no respect relevant to plaintiff's action based upon violation of the Blue Sky statute and the toll-

ing of the statute of limitations, with respect to which it appears the court intends solely to find against defendant.

Defendant also will move to amend what appears to be a typographical error in the last line of the first paragraph of finding numbered IX, by adding the year "1929" between the figures "21" and "1930."

Defendant further will move to amend the following which are in substance conclusions of law, although designated findings of fact:

1

By striking the final paragraph of the so-called finding [fol. 1089] of fact numbered XXII which reads as follows:

> "On or about said 7th day of July, 1931, the defendant departed from the state of Minnesota and has at all times since said date resided outside of the state of Minnesota and at no time thereafter has defendant been present within the state of Minnesota or returned thereo."

2

By striking the so-called finding of fact numbered XXIII which reads as follows:

> "The summons and complaint in this action were duly served upon the defendant and this action commenced on November 22, 1937, and within the time limited by the statutes of the state of Minnesota for the commencement of such action."

And by adding in lieu thereof the following:

> "That the summons and complaint in this action were served on the Commissioner of Securities as defendant's agent for service of process on November 22, 1937, and the action was commenced more than six years after the sale of said Chase units."

3

By striking out the so-called Finding of Fact numbered XXI which reads as follows:

> "By reason of the illegality and invalidity of said sale, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together

[fol. 1090] with interest thereon at the rate of six per cent per annum from and after August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof."

4

By striking out the Conclusions of Law numbered I and II, and inserting in lieu thereof the following:

(a)

"That defendant did not depart from and reside out of the state within the meaning of the tolling statute (§9200, Mason's Minn. Stat. 1927); that defendant was at all times subject to personal service of process and subject to jurisdiction over its person in Minnesota."

(b)

"That plaintiff's cause of action did not accrue within six years prior to the commencement of the action and is barred by the statute of limitations."

(c)

"That judgment be entered for the defendant dismissing plaintiff's action and for defendant's costs and disbursements."

The foregoing portion of defendant's motion to amend will be based upon the following grounds:

(a) That the so-called Findings of Fact which are in [fol. 1091] substance Conclusions of Law are not sustained by the facts found by the Court.

(b) That the plaintiff's action is barred by the statute of limitations and the tolling statute (§9200, Mason's Minn. Stat. 1927) has no application for the reason that the defendant was at all times amenable to jurisdiction over its person by service of process on an agent in the state; that defendant has not departed from and has not resided out of the state.

(c) That the tolling statute, as construed and applied by the court, denies to defendant the equal protection of the laws guaranteed by Sec. 1 of the 14th Amendment of the Constitution of the United States.

(d) That the tolling statute as construed and applied by the court, deprives defendant of its property without due process of law, in violation of the provisions of Sec. 1 of the 14th Amendment of the Constitution of the United States.

(e) That the said tolling statute (§ 9200, Mason's Minn. Stat. 1927) should be so construed and applied as to avoid serious questions of constitutionality, and should be so construed as not to apply to a foreign corporation which, in complying with §7494 of Mason's Minn. Stat. 1927, relating to withdrawal from the state upon ceasing business activities, is at all times subject [fol. 1092] to personal service of process and amenable to jurisdiction over its person in the courts of Minnesota.

MOTION FOR NEW TRIAL

Defendant's motion in the alternative for a new trial is based upon the following grounds:

1

That the decision of the court is contrary to law.

2

That the conclusions of law are not justified by the findings of fact.

3

That the court erred in holding that the tolling statute (§9200, Mason's Minn. Stat. 1927) applied, and that the defendant had departed from and resided out of the state of Minnesota, notwithstanding that it at all times had an agent for personal service of process within the state, and was at all times subject to jurisdiction over its person in the courts of the state.

4

That the court erred in holding that the tolling statute (§9200, Mason's Minn. Stat. 1927) applied for the reason that the statute, as so construed and applied, raises a serious question as to the constitutionality of said statute.

5

That the court erred in holding that the said tolling stat- [fol. 1093] ute applied for the reason that the statute, as

so construed and applied, deprives the defendant of the equal protection of the laws contrary to Sec. 1 of the 14th Amendment of the Constitution of the United States.

6

That the court erred in holding that the said tolling statute applied for the reason that the statute, as so construed and applied, deprives defendant of its property without due process of law contrary to Sec. 1 of the 14th Amendment of the Constitution of the United States.

That the foregoing motions will be based upon all relevant files, records and proceedings in the case.

Dated April 23rd, 1940.

Stinchfield, Mackall, Crounse & Moore, 1100 First National-Soo Line Building, Minneapolis, Minnesota, Attorneys for Defendant.

In District Court of Hennepin County

Order on Motion to Amend Findings, Etc.

The above entitled matter came regularly on for hearing before the undersigned, one of the judges of the above named court, at chambers on the 4th day of May, 1940, upon an order to show cause and motion on the part of defendant for an order of this court to amend the findings of fact and [fol. 1094] conclusions of law and order for judgment heretofore entered, the alternative motion for a new trial having been dismissed by counsel, all on the grounds and for the reasons set forth in said notice of motion, affidavit and order to show cause; John M. Palmer, Esq., of the firm of Messrs. Stinchfield, Mackall, Crounse & Moore, appearing for defendant in support of said motion, and Thomas Streissguth, Esq., and Messrs. Leonard, Street & Deinard, appearing for plaintiff in opposition thereto. The Court, after listening to the argument of counsel for the respective parties, being fully advised in the premises, and upon all the files, proceedings and records had, it is

Ordered that the phrase "and fraud" appearing in the eleventh and twelfth lines of finding No. 24 be eliminated by consent of all parties; that the motion in all other respects be denied.

Dated May 6, 1940.

By the Court, W. W. Bardwell, District Judge.

MEMORANDUM

Counsel for plaintiff in written objections contend that the motion should be dismissed for the reason that the record contains no bill of exceptions, settled case, or motion based upon the minutes of the court, as provided by statute; counsel for defendant contending that inasmuch as he was only asking for amended conclusions of law that the findings [fol. 1095] of fact were admitted, that he was well within his rights in making the motion not only for an amendment to the conclusions of law, but as to striking out certain findings of fact as set forth in said motion, claiming that in an appeal with the findings of fact as now filed that the question of implied fraud might be injected into the hearing and the court consider that in connection with other claims.

The court feels that paragraph 26 of said findings of fact sets out specifically just what the court had in mind and on what basis the court decided the above entitled matter, in which it says, "The court finds it unnecessary to make findings on the claims of actual fraud, implied fraud and fraud by suppression of material facts presented by the plaintiff inasmuch as the court has allowed recovery on a ground independent of said claims."

The court at the hearing on this motion stated that he wanted it definitely understood that the only questions determining the above entitled matter were, first, the legality of the sale under the Minnesota statutes; and, second, the tolling of the statute. Counsel for plaintiff agreed with the court and specifically stated to the court that upon the present findings that was the only matter that could and should be raised in the Supreme Court, and that if the matter were appealed upon the present findings would be the only question presented. The court relied upon the promises of counsel, and feeling that if the only question to be raised was as above stated, that the matters asked to be stricken [fol. 1096] by counsel for defendant would be wholly immaterial. The court might say with reference to the words "wilful" and "wilfully" appearing in the findings, that it did not intend by these words to intimate that defendant in its actions was obstinate, perverse or stubborn, but that the acts were unlawful.

Let this memorandum be made a part of the foregoing order.

W. W. Bardwell, J.

In District Court of Hennepin County

Order Amending Order on Motion

It being called to the court's attention that the Order dated May 6, 1940, erroneously recited that defendant's alternative motion for a new trial was dismissed by counsel, and it appearing that counsel did not dismiss said motion but only the first paragraph thereof, and with the consent of both counsel for plaintiff and defendant.

It Is Hereby Ordered that the order dated May 6, 1940, be amended so as to provide that the motion for new trial as well as the motion for amended findings and conclusions of law and order for judgment be denied.

Dated May 8th, 1940.

By the Court,

W. W. Bardwell, District Judge.

[fol. 1096a] In District Court of Hennepin County

Order to Show Cause

Upon motion of T. O. Streissguth, Esq., and Messrs. Leonard, Street & Deinard, attorneys for plaintiff, it appearing that an exigency exists wherefor the usual time for hearing the hereto attached motions should be shortened,

It is hereby ordered that defendant appear before the undersigned in chambers in the court house in the city of Minneapolis, above county and state, on May 8, 1940, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, and show cause why the hereto attached motions to amend findings of fact and to add special findings of fact, or in the alternative for a new trial, should not be granted.

It is further ordered that all proceedings be stayed until the hearing and determination of said motions.

Let a copy of the foregoing order to show cause and attached notice of motion be served upon Messrs. Stinchfield, Mackall, Crounse & Moore, attorneys for defendant, not later than May 7, 1940.

Dated May 7, 1940.

By the Court,

W. W. Bardwell, Judge.

[fol. 1096b] IN DISTRICT COURT OF HENNEPIN COUNTY

NOTICE OF MOTIONS

To defendant above named, and to Messrs. Stinchfield, Mackall, Crounse & Moore, its attorneys:

You will please take notice that on the 8th day of May, 1940, at the hour of 9:30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, before Honorable W. W. Bardwell, one of the judges of said court, in chambers, in the court house in the city of Minneapolis, above county and state, plaintiff will move the court for an order:

1. Amending the findings of fact made and entered on April 18, 1940, by striking therefrom paragraph XXVI of said findings.

2. Adding to said findings the following special findings of fact, as follows:

"XXVI. That in selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of Mason's Minnesota Statutes, 1927, chapter 21-b; that the solicitation, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws and statutes of the state of Minnesota and the United States of America, and constituted a legal and valid solicitation, offer and sale of said Chase units; that said Chase units were in all respects valid, legal and genuine; that it and its [fol. 1096c] agents were duly licensed to solicit, offer for sale and sell said Chase units in the state of Minnesota.

"XXVII. That in selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at which plaintiff purchased said units from defendant was determined by lawful and legitimate fac-

tors of supply and demand and was free from any manipulation or control by defendant.

"XXVIII. In selling said Chase units to plaintiff, defendant fraudulently suppressed the facts concerning the nature and formation of said bank and its affiliate, Chase Securities Corporation, and fraudulently concealed and suppressed the fact that said Chase units were not registered for sale within the state of Minnesota, and were illegally sold therein, and that its agent, Weir Jepson, was not licensed to offer for sale or to sell said Chase units within the state of Minnesota, and fraudulently concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price [fol. 1096d] of said Chase units and fraudulently concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market.

"XXIX. Plaintiff, in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the state of Minnesota, and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew.

"XXX. At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to bona fide bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant.

"XXXI. During the years 1928 and 1929, the defendant through its wholly owned subsidiary and ad-

[fol. 1096e] junct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts for the purpose of dealing in its own capital stock. Defendant participated in said pools and the trading accounts through its wholly owned subsidiary, Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a convenience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which defendant was thereby able to exert in [fol. 1096f] over-the-counter market for said units, and the price at which said units were sold to the public.

"By reason of said pools and defendant's participation therein, an appearance of great interest and activity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools. Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant and its associates, and by information disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the securities on the part of the purchasing public was created and plaintiff was induced to purchase said

units upon such misleading appearance so fraudulently created. The quoted price of said units at the time of plaintiff's purchase of the same was not a true and genuine price arrived at by lawful and legitimate factors of supply and demand in a free market, but, on the contrary, the market appraisal of said units was wrongfully manipulated and controlled by defendant through the medium of said pools and trading accounts.

"XXXII. Plaintiff did not discover the falsity of defendant's implied representations or any of them nor [fol. 1096g] did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts concealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action.

"In so far as plaintiff's cause of action is founded on implied representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for 'relief on the grounds of fraud' in which case, as provided in Mason's Minnesota Statutes, 1927, Section 9191, the cause of action is not 'deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.' Plaintiff not having discovered the facts constituting defendant's fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the state of Minnesota."

In the event the foregoing motion for amendment of findings of fact and for special findings of fact is denied, plaintiff will move the above court at said time and place for an order granting her a new trial on the issues of fraud, implied fraud and fraud by concealment.

The foregoing motions are made upon all the files, rec- [fol. 1096h] ords and proceedings herein, and upon the minutes of the court.

The grounds of said motions for amendment of findings of fact and for special findings of fact are:

1. That plaintiff is entitled to findings of fact on the theories of fraud, implied fraud and fraud by concealment,

said case having been tried on said theories in addition to the theory on which the findings of fact, conclusions of law and order for judgment are based.

2. The evidence justified a decision on the ground of fraud, implied fraud and fraud by concealment.

3. In the event of an appeal to the Supreme Court of the state of Minnesota, it is desirable in the interests of all parties to present at one time all of the possible theories in support of a judgment in favor of plaintiff, so as to avoid the necessity of piecemeal consideration of this case on appeal.

The grounds of the alternative motion for a new trial on the issues of fraud, implied fraud and fraud by concealment are:

1. The decision of the court is contrary to law in so far as it fails to make findings upon the issues of fraud, implied fraud and fraud by concealment.

2. The evidence justified findings of fact, conclusions of law and order for judgment on the theory of fraud, im-
[fol. 1096i] plied fraud and fraud by concealment.

3. Plaintiff is entitled to findings of fact, conclusions of law and order for judgment to the end that in the event of an appeal all of issues in this case may be reviewed by the Supreme Court of the state of Minnesota at one time, rather than by piecemeal presentation to said court.

Dated May 7, 1940.

T. O. Streissguth and Leonard, Street & Deinard, Attorneys for Plaintiff, 1036 Andrus Building, Minneapolis, Minnesota.

IN DISTRICT COURT OF HENNEPIN COUNTY

ORDER DENYING MOTIONS TO AMEND FINDINGS, ETC.

The above entitled matter came on for hearing before the undersigned, one of the judges of the above court, in chambers, on May 8, 1940, pursuant to notice of motion and order to show cause dated May 7, 1940, on plaintiff's motions: (1) for an order amending the findings of fact made

and entered on April 18, 1940, adding special findings of fact as set forth in said notice of motion, and requiring this court to make findings of fact on the issues of fraud, implied fraud and fraud by concealment, and (2) in the alternative, for a new trial of the issues of fraud, implied fraud and fraud by concealment. T. O. Streissguth, Esq., and [fol. 1096j] Messrs. Leonard, Street & Deinard, appeared for the plaintiff in support of said motions, and John M. Palmer, Esq., and Messrs. Stinchfield, Mackall, Crounse & Moore, appeared for defendant in opposition thereto. The court having heard the arguments of counsel and being of the opinion that the present findings are adequate to support the order for judgment, for the reason that the court has sustained recovery for the plaintiff on an independent ground, namely, violation of the Blue Sky Law, and tolling of the statute of limitations, and that therefore it is unnecessary at this time to make findings on the issues presented in said notice of motion,

It is hereby ordered that plaintiff's motions be and they hereby are in all things denied.

Dated May 8th, 1940.

By the Court, W. W. Bardwell, Judge.

20 day stay.

[fol. 1097] In District Court of Hennepin County

Judgment and Decree—June 18, 1940

The above entitled action having been regularly placed upon the calendar of the above named court for the September A. D. 1938 General Term thereof, came on for trial before the court on the 9th day of May, A. D., 1939; and the court, after hearing the evidence adduced at said trial and being fully advised in the premises, did on the 18th day of April, A. D., 1940, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of Messrs. T. O. Streissguth and Leonard, Street and Deinard, attorneys for plaintiff, it is hereby adjudged and decreed:

1. That plaintiff have and recover of defendant the sum of Two Thousand Seven Hundred Forty-five and 13/100 Dollars ($2,745.13), the amount ordered with interest to

date hereof, together with the sum of Thirty-two and 45/100 Dollars ($32.45), costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of Two Thousand Seven Hundred Seventy-seven and 58/100 Dollars ($2,777.58).

2. That, upon satisfaction by defendant of said judgment, plaintiff shall deliver to the Clerk of the District Court of Hennepin County, Minnesota, a certificate numbered 170762 for nine (9) shares of common stock in The Chase National Bank of the City of New York and a certificate numbered [fol. 1098] 067711 for one share of common stock in defendant, Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificate shall, upon execution of proper receipt therefor, be delivered to defendant.

By the Court, George H. Hemperley, Clerk of District Court. By W. C. Carlson (S.), Deputy.

IN SUPREME COURT OF MINNESOTA

MANDATE

The State of Minnesota

To the Honorable Judge and Officers of the District Court within and for the County of Hennepin, Greeting:

Whereas, lately in your court, in action therein pending, entitled Ruth Chase Donaldson, plaintiff, and Chase Securities Corporation, a corporation, now known as Amerex Holding Corporation, defendant, a certain orders was entered therein May 6, 1940, and May 8, 1940, from which action of your court an appeal thereafter was taken to this court;

And Whereas, the said cause came on to be heard before our Supreme Court, and was argued in counsel;

On Consideration Whereof, it is now here ordered and [fol. 1099] adjudged by this court that the order of the court below herein appealed from, be, and the same hereby is, in all things reversed and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur.

Now, Therefore, this Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Honorable Henry M. Gallagher, Chief Justice of the Supreme Court aforesaid, and the seal of said court at St. Paul, this March 7, 1941.

Grace Kaercher Davis, Clerk of the Supreme Court.
By Mae Sherman, Deputy.

(Seal of the Supreme Court, State of Minnesota.).

[fol. 1100] In Supreme Court of Minnesota

Mandate

To the Honorable Judge and Officers of the District Court within and for the County of Hennepin, Greeting:

Whereas, lately in your court, in action therein pending, entitled Ruth Chase Donaldson, plaintiff, and Chase Securities Corporation, a corporation, now known as Amerex Holding Corporation, defendant, a certain judgment was entered therein June 18, 1940, from which action of your court an appeal thereafter was taken to this court;

And Whereas, the said cause came on to be heard before our Supreme Court, and was argued in counsel;

On Consideration Whereof, it is now here ordered and adjudged by this court that the order of the court below herein appealed from, be, and the same hereby is, in all things reversed and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur.

Now Therefore, this Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by [fol. 1101] virtue of the said order herein made.

Witness, The Honorable Henry M. Gallagher, Chief Justice of the Supreme Court aforesaid, and the seal of said court at St. Paul, this March 7, 1941.

Grace Kaercher Davis, Clerk of the Supreme Court.
By Mae Sherman, Deputy.

(Seal of the Supreme Court, State of Minnesota.)

In District Court of Hennepin County.

Order to Show Cause

Upon the verified petition of plaintiff hereto attached, and upon all the files, records and proceedings herein, the court being fully advised in the premises;

It is hereby ordered that leave be and hereby is granted to plaintiff to renew her motion for an order settling and allowing a case herein, and to move for supplemental and corrected findings of fact.

It is further ordered that defendant show cause before this court and the undersigned judge thereof, in his chambers in the court house in the city of Minneapolis, said county and state, on the 18th day of April, 1941, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, why an order should not be made granting to plaintiff the relief prayed for in the hereto attached Notice of Motion, [fol. 1102] and, more particularly, granting said motions.

Dated this 9th day of April, 1941.

By the Court, W. W. Bardwell, Judge.

In District Court of Hennepin County.

Notice of Motion

To: Defendant above named, and Messrs. Stinchfield, Mackall, Crounse and Moore, its attorneys:

You, and each of you, will please take notice that on the 18th day of April, 1941, at the hour of 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, at the court house, in the city of Minneapolis, above county and state, plaintiff above named will move the above court in chambers, before Honorable W. W. Bardwell, for an order

settling and allowing as a settled case herein, the proposed case heretofore served by plaintiff upon defendant, which proposed case will then and there be presented to the court for settlement and allowance, as conformable to the truth and as containing all the evidence offered or introduced at the trial of this case, and also all objections, rulings, orders, and other proceedings upon such trial, except the exhibits that may be considered attached to said settled case by reference.

You will further take notice that at said time and place, plaintiff will also move the court for an order supplementing and correcting the Findings of Fact, Conclusions of [fol. 1103] Law, and order for Judgment, made and entered by this court on April 18, 1940, in the following respects and particulars:

1. By striking therefrom paragraph XXI of said Findings.

2. By striking therefrom paragraph XXII of said Findings.

3. By striking therefrom paragraph XXIII of said Findings.

4. By striking therefrom paragraph XXV of said Findings.

5. By striking therefrom paragraph XXVI of said Findings.

6. By renumbering paragraph XXIV of said Findings so as to number the same paragraph XXI.

7. By adding to said Findings, the following Findings of Fact, as follows:

> "XXII. In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of Mason's Minnesota Statutes, 1927, Chapter 21-B, that solicitation, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws and statutes of the state of Minnesota and the United States of America, and constituted a legal and valid solicitation, offer and [fol. 1104] sale of said Chase units; that said Chase units were in all respects valid, legal and genuine;

that it and its agents were duly licensed to solicit, offer for sale and sell said Chase units in the state of Minnesota."

"XXIII. In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at which plaintiff purchased said units from defendant was determined by lawful and legitimate factors of supply and demand and was free from any manipulation or control by defendant."

"XXIV. In selling said Chase units to plaintiff, defendant fraudulently suppressed the facts concerning the nature and formation of said bank and its affiliate, Chase Securities Corporation, and fraudulently concealed and suppressed the fact that said Chase units were not registered for sale within the state of Minnesota, and were illegally sold therein and that its agent, Weir Jepson, was not licensed to offer for sale or to sell said Chase units within the state of Minnesota, and fraudulently concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of [fol. 1105] which defendant controlled and manipulated the market price of said Chase units and fraudulently concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market."

"XXV. Plaintiff in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the state of Minnesota, and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew."

"XXVI. At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to bona fide bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant."

"XXVII. During the years 1928 and 1929, the de- [fol. 1106] fendant through its wholly owned subsidiary and adjunct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts for the purpose of dealing in its own capital stock. Defendant participated in said pools and the trading accounts through its wholly owned subsidiary, Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a convenience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which [fol. 1107] defendant was thereby able to exert in over-the-counter market for said units, and the price at which said units were sold to the public.

By reason of said pools and defendant's participation therein, an appearance of great interest and ac-

tivity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools.

Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant and its associates, and by information disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the securities on the part of the purchasing public was created, and plaintiff was induced to purchase said units upon such misleading appearance so fraudulently created. The quoted price of said units at the time of plaintiff's purchase of the same was not a true and genuine price arrived at by lawful and legitimate factors of supply and demand in a free market, but, on the contrary, the market appraisal of said units was wrongfully manipulated and controlled by defendant through the medium of said pools and trading accounts."

[fol. 1108] "XXVIII. Plaintiff did not discover the falsity of defendant's implied representations or any of them nor did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts concealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action.

In so far as plaintiff's cause of action is founded on implied representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for 'relief on the grounds of fraud' in which case, as provided in Mason's Minnesota Statutes, 1927, Section 9191, the cause of action is not 'deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.' Plaintiff not having discovered the facts constituting defendant's

fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the state of Minnesota."

"XXIX. By reason of the premises, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together with interest thereon at the rate of six per cent (6%) per annum from and after August 23, 1939, less credit for said [fol. 1109] dividends of $189.56, together with interest accrued from the dates of payment thereof."

In the event the foregoing motion to supplement and correct said Findings of Fact is denied, plaintiff will move the above court at said time and place for an order granting her a new trial on the issues of fraud, implied fraud, and fraud by concealment.

The foregoing motions are made upon all the files, records, proceedings herein, and upon the transcript and/or settled case.

The grounds of said motion to supplement and correct said Findings of Fact are:

1. That plaintiff is entitled to Findings of Fact on the theories of fraud, implied fraud and fraud by concealment.

2. The evidence justified a decision on the grounds of fraud, implied fraud, and fraud by concealment.

The grounds of the alternative motion for a new trial on the issues of fraud, implied fraud, and fraud by concealment, are:

1. The decision of the court is contrary to law in so far as it fails to make findings upon the issues of fraud, implied fraud and fraud by concealment.

2. The evidence justified findings of fact, conclusions of law and order for judgment on the theory of fraud, implied fraud, and fraud by concealment.

[fol. 1110] Dated at Minneapolis, Minnesota, this 9th day of April, 1941.

T. O. Streissguth, New Ulm, Minnesota; Leonard, Street & Deinard, 1036 Andrus Building, Minneapolis, Minnesota, Attorneys for Plaintiff.

IN DISTRICT COURT OF HENNEPIN COUNTY

PETITION

Now comes plaintiff above named, by her attorneys, Messrs. Streissguth & Gislason and Leonard, Street & Deinard, and respectfully represents and states to the court:

I

On April 18, 1940, this court duly made and filed Findings of Fact, Conclusions of Law and Order herein, directing judgment in favor of plaintiff and against defendant.

II

On May 4, 1940, defendant interposed its motion to amend said Findings of Fact, Conclusions of Law and Order or, in the alternative, for a new trial.

On May 6, 1940, this court made and filed its order denying said motion, except for a minor correction.

III

Finding XXVI of said decision provided as follows:

> "The court finds it unnecessary to make findings on the claim of actual fraud, implied fraud, and fraud by suppression of the material facts presented by the complaint inasmuch as the court has allowed recovery on a ground independent of said claims."

On May 7, 1940, plaintiff duly interposed her motion, upon the minutes of the court, for an order amending said Findings and adding certain special findings of fact upon the issues of fraud, or, in the alternative, for a new trial upon said issues. On May 8, 1940, this court filed its order denying said motion for the following reason:

> "The court has sustained recovery by plaintiff on an independent ground, namely, violation of the Blue Sky Law, and tolling of the statute of limitations, and that therefore it is unnecessary at this time to make findings on the issues presented in said notice of motion."

IV

On May 11, 1940, defendant appealed to the Supreme Court of the State of Minnesota from said order of May 6,

1940. On June 18, 1940, judgment in favor of plaintiff was entered, and on June 19, 1940, defendant appealed to the Supreme Court from said judgment. Upon said appeals said order of May 6, 1940, and said judgment were reversed [fol. 1112] by the Supreme Court. The mandate from the Supreme Court was filed herein on March 8, 1941. Said decision by the Supreme Court with "without prejudice" to the "issue other than that of the tolling of the statute of limitations."

V

On September 6, 1940, plaintiff served upon defendant a transcript of the testimony, and proposed the same for settlement and allowance by this court.

On September 11, 1940, this court, in view of the pendency of said appeals, and the proceedings and orders hereinbefore referred to, denied plaintiff's motion for an order settling and allowing said proposed case.

VI

The Supreme Court having decided adversely to plaintiff on the issue of the tolling of the statute of limitations, plaintiff is now entitled to a determination of the issues of fraud, implied fraud, and fraud by suppression, and for that purpose is now entitled to an order settling and allowing the case herefofore proposed, and to an order granting plaintiff leave to move this court for supplemental and corrected findings of fact.

Wherefore plaintiff prays this court for an order granting plaintiff leave to renew her motion for an order settling and allowing said proposed case and leave to move for supplemental and corrected findings, and thereupon fixing [fol. 1113] a time for hearing said motions and ordering defendant to show cause why said motions should not be granted.

Dated April 9, 1941.

Ruth Chase Donaldson, Petitioner. By Streissguth & Gislason, and Leonard, Street & Deinard, Her Attorneys.

(Duly Verified.)

IN DISTRICT COURT OF HENNEPIN COUNTY

NOTICE OF SUPPLEMENTAL MOTION

To defendant above named, and Messrs. Stinchfield, Mackall, Crounse and Moore, its attorneys:

You, and each of you, will please take notice, that, on the 19th day of May, 1941, at the hour of 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, at the court house in the city of Minneapolis, above county and state, pursuant to leave heretofore granted to plaintiff by this court, by its order dated April 9, 1941, to move for supplemental and corrected Findings of Fact, plaintiff above named will move the court in chambers, before Honorable W. W. Bardwell, for an order supplementing the Findings of Fact, Conclusions of Law and Order for Judgment made and entered by this court on April 18, 1940, in the following respects and particulars:

1. By adding to said proposed Findings, in addition to [fol. 1114] those set forth in plaintiff's Notice of Motion dated April 9, 1941, the following Finding of Fact:

> "XXIX. Plaintiff's cause of action, based upon the illegal sale by defendant to her of said securities in violation of the provisions of the Blue Sky Law, was revived by virtue of the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Minnesota Statutes 1927, Secs. 3996-24 as amended), and the time for assertion of said cause of action was extended by the provisions of said statute to July 1, 1942, and said cause of action was asserted and commenced within the time limited by the statutes of the State of Minnesota for the commencement of such action."

2. By renumbering proposed Finding XXIX, as set forth in plaintiff's Notice of Motion dated April 9, 1941, so that the same shall be numbered XXX.

Notice is further given of plaintiff's withdrawal of motion to strike paragraph XXIII of the Findings.

The foregoing motion is supplemental to the motion, notice of which was given by plaintiff under date of April 9, 1941, and is made upon all the files, records and proceedings

herein, including the settled case, and upon the following additional grounds:

That subsequent to the service of plaintiff's Notice of Motion dated April 9, 1941, the Legislature of the State of Minnesota enacted Laws of Minnesota 1941, Chapter 547, [fol. 1115] which revived plaintiff's cause of action based upon the illegal sale of securities to her, and that plaintiff is thereby entitled to a finding of fact that plaintiff seasonably commenced her cause of action based on said illegality.

In the event the foregoing motion and plaintiff's prior motion to supplement and correct the said Findings of Fact is denied, plaintiff will at the time and place aforesaid move the above court for an order granting her a new trial of this action, upon the following grounds, to-wit:

1. Errors of law occurring at the trial and duly excepted to at the time.

2. That the decision of the court is not justified by the evidence and is contrary to law.

3. That the court erred in failing to make findings upon the issues of fraud, implied representations, and fraud by concealment.

4. That the court erred in failing to make a finding that Laws of Minnesota 1941, Chapter 547, revived plaintiff's cause of action for illegal sale of securities and extended the time for the assertion of said cause of action to July 1, 1942.

5. That the evidence justified and required findings of fact, conclusions of law, and order for judgment in favor of plaintiff and against defendant on the theories of illegality, fraud, implied fraud and fraud by concealment.

[fol. 1116] Dated at Minneapolis, Minnesota, this 16th day of May, 1941.

T. O. Streissguth and Leonard, Street & Deinard, Attorneys for Plaintiff, 1036 Andrus Building, Minneapolis, Minnesota.

IN DISTRICT COURT OF HENNEPIN COUNTY

NOTICE OF MOTION OF DEFENDANT

To plaintiff above named and Messrs. Streissguth & Gislason, and Leonard, Street & Deinard, her attorneys:

You, and each of you, will please take notice, that on the 16th day of May, 1941, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, at the court house in the city of Minneapolis, above county and state, defendant will move the court in chambers before the Honorable W. W. Bardwell for an order granting leave to defendant to submit and file proposed amendments to the court's Findings of Fact, Conclusions of Law, and Order for Judgment herein and to argue the issues remaining for disposition in the case.

You will further take notice, that in the event that said leave be granted, defendant at said time and place will move move the court to amend its Findings of Fact, Conclusions of Law, and Order for Judgment made and entered on April [fol. 1117] 18, 1940, as amended by its orders of May 6, 1940, and May 8, 1940, in the folowing respects:

1. By striking therefrom Finding VII and substituting in lieu thereof the following:

"VII

"Defendant was organized and its stock inextricably bound up with the stock of the bank, as has been described, at the instance of the shareholders of the bank, for the purpose of enabling such shareholders to profit by defendant's engaging in the securities business in which the bank itself could not engage."

2. By striking therefrom Finding XII and substituting in lieu thereof the following:

"XII

"During the period while defendant was licensed as aforementioned in Minnesota, it engaged in the business of buying and selling securities including the Chase units, to residents of the state of Minnesota, among others. It maintained three offices, located in St. Paul, Duluth, and Minneapolis, staffed with sales-

men duly licensed under the Blue Sky Law of Minnesota and equipped with office furniture and equipment. The offices in Minnesota were under the control of and subordinate to an office of defendant in Chicago, Illinois. The sale of Chase units was customarily handled in the following manner: a salesman working [fol. 1118] out of one of the Minnesota offices would receive an order from a customer in this state; the order would be transmitted by telephone, telegraph or mail to the Chicago office; the Chicago office would then wire the order to the New York office of defendant which in turn would advise the Chicago office when, and the price at which, the order had been filled; the Chicago office would then send a confirmation in writing to the customer; in a majority of cases payment would be made by a remittance of the customer directly to the Chicago office, but the local Minnesota office in many instances accepted payment from customers and remitted the same to the Chicago office; the security was mailed by the Chicago office direct to the customer or to the Minneapolis office for delivery by it to the customer; in some cases, as in that at bar, the security would be sent to the customer's local bank with draft attached and the local bank would remit to defendant for the customer."

3. By striking from Finding XIII the words "duly authorized by it" appearing in the first sentence of said Finding.

4. By striking therefrom Finding XIV and substituting in lieu thereof the following:

"XIV

"On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Company re- [fol. 1119] ceipt, a duplex certificate for nine units, No. F52498, which was offered and received in evidence as Plaintiff's Exhibit N.

"On August 12, 1936, the bank issued to plaintiff, in exchange for said duplex certificate, one certificate, for nine shares of bank stock, being certificate No. 170762, which was offered and received in evidence as Plaintiff's Exhibit P. At the same time plaintiff was

entitled to a scrip certificate for 9/10th of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to the bank of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

"The exchange of the duplex certificate for separate shares in the bank and defendant was occasioned by the termination of the affiliation between the bank and defendant as follows: On May 17, 1933, the Certificate of Incorporation of defendant was amended to provide that thereafter the defendant should not, either directly or indirectly, engage in the business of publicly buying or selling securities; the par value of defendant's shares was reduced from $5.00 to $1.00 per share, thereby reducing the capital from $37,000,000 to $7,400,000; and the name of the corporation changed from 'Chase [fol. 1120] Securities Corporation' to 'The Chase Corporation.' On June 15, 1934, the Certificate of Incorporation of defendant, then known as The Chase Corporation, was amended to eliminate the provision requiring its shareholders to be shareholders of the bank and forbidding transfer of shares in one corporation without joint and simultaneous transfer of shares in the other corporation, and the deposit agreement of March 21, 1917, was terminated. At about the same time, the par value of each share of defendant was increased from $1.00 to $10.00, and the number of outstanding shares was reduced from 7,400,000 to 740,000, and the name of defendant was changed from 'The Chase Corporation' to 'Amerex Holding Corporation.'"

5. By striking from Finding XV the word "wilfully" appearing in the second sentence of the first paragraph of said Finding and by striking therefrom the second and third paragraphs of said Finding.

6. By striking from Finding XVI the following:

"but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and

others in the state of Minnesota in the course of successive and repeated sales thereof within the state of Minnesota."

[fol. 1121] 7. By striking from Finding XVII the words "void, and incapable of ratification or confirmation" appearing in the first sentence of said Finding and substituting in lieu thereof the word "voidable," and by striking the words "wholly illegal and wholly void" appearing in the second sentence of said Finding and by substituting in lieu thereof the words "illegal and voidable."

8. By striking therefrom Finding XVIII.

9. By renumbering Finding XIX so that the number thereof shall be "XVIII" and by striking from said Finding the words "Promptly upon discovery of the illegality of said sale, and" appearing in the first sentence thereof and by striking from said Finding the following:

> "Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of [fol. 1122] any dividends which she had received, with interest."

10. By renumbering Finding XX so that the number thereof shall be "XIX" and by striking from said Finding the words "said discovery" appearing in the first sentence thereof.

11. By striking therefrom Finding XXI.

12. By renumbering Finding XXII so that the number thereof shall be "XX" and by striking from said Finding the last paragraph thereof reading:

"On or about said 7th day of July, 1931, the defendant departed from the state of Minnesota and has at all times since said date resided outside of the state of Minnesota and at no time thereafter has defendant been present within the state of Minnesota or returned thereto."

13. By striking therefrom Finding XXIII and by substituting in lieu thereof the following:

"XXI

"The summons and complaint in this action were served on the Commissioner of Securities as defendant's agent for service of process on November 22, 1937, and the action was commenced more than six years after the sale of said Chase units."

14. By renumbering Finding XXIV so that the number thereof shall be "XXII" and by striking therefrom the [fol. 1123] following:

"before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

"'Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing.'"

15. By striking therefrom Finding XXV and Finding XXVI.

16. By adding to said Findings the following Findings of Fact:

"XXIII

"In connection with said sale defendant made no false representations of fact express or implied, to plaintiff with respect to the registration of said stock, the licensing of its agent, Weir Jepson, or any other material fact, nor did it by its words or conduct make

any false representations, express or implied, to plaintiff or create a false appearance with respect to any material fact.

[fol. 1124] "XXIV

"In connection with said sale defendant did not hide, conceal or suppress any material fact from the plaintiff, nor did it engage in any course of conduct designed to hide or conceal any material facts from the plaintiff or designed to prevent and hinder the plaintiff from knowing and obtaining knowledge of all material facts.

"XXV

"Except as hereinbefore specifically found, the court finds the allegations of plaintiff's complaint not true and unsubstantiated."

17. By striking therefrom the Conclusions of Law as found by this court and by substituting in lieu thereof the following:

"a. The only cause of action established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute' within the meaning of Section 9191, subdivision 2, Mason's Minn. Stat., 1927, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 547, Laws of Minn., 1941.

"b. Defendant did not depart from and reside out of the state within the meaning of Section 9200, [fol. 1125] Mason's Minn. Stat., 1927, commonly described as the tolling provision of the statute of limitations, and the said statute of limitations is not tolled.

"c. There is no substantial evidence to establish a cause of action for relief on the ground of fraud either express or implied, in favor of the plaintiff, and the action is not one for relief on the ground of fraud within the meaning of Section 9191, subdivision 6, Mason's Minn. Stat., 1927.

"d. There is no competent evidence from which the court would be justified in finding that the market for said Chase units was controlled and manipulated by defendant, and the matter relating to so-called market control and manipulation which was admitted subject to objection has been disregarded.

"e. Defendant's motions to strike the matter offered from the so-called Pecora reports, identified as Plaintiff's Exhibits A-55, A-56, and A-57, and the matter offered from the Segal case are granted.

"Let judgment be entered for defendant dismissing the action and against plaintiff for its costs and disbursements."

You will also please take notice, that in connection with its motion to amend the court's Findings of Fact, Conclusions of Law and Order for Judgment, defendant will renew its motions made at the conclusion of the trial, and [fol. 1126] found as a part of the transcript at pp. 466-475, to strike the items of evidence referred to in said motions upon the grounds therein enumerated.

Said motion for leave to submit admendments to the court's Findings of Fact, Conclusions of Law and Order for Judgment and for leave to argue remaining issues is based on the ground that upon the pleadings and evidence in the case, issues of alleged fraud and the Statute of Limitations applicable to such action remain for determination by the court.

Said motion to amend the court's Findings of Fact, Conclusions of Law and Order for Judgment are based on the following grounds:

1. The only cause of action established by the evidence is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the Statute of Limitations.

2. The matter contained in the court's present Findings of Fact, Conclusions of Law and Order for Judgment, which are inconsistent with and irrelevant to an action based on violation of statute, should be stricken.

3. Section 18 of Chapter 547, Laws of Minnesota, 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat., 1927.

[fol. 1127] 4. There is no evidence to justify the court in finding that plaintiff had established a cause of action for relief on the ground of fraud, and Section 9191, subdivision 6, Mason's Minn. Stat., 1927, has no application to the case.

5. The matter offered from the so-called Pecora Report and Segal Record is hearsay and incompetent evidence and defendant's motions to strike said evidence and all matter offered in connection with and related thereto should be granted.

Dated May 14, 1941.

Stinchfield, Mackall, Crounse & Moore, 1100 First National-Soo Line Building, Minneapolis, Minnesota, Attorneys for Defendant.

In District Court of Hennepin County

Notice of Entry of Findings of Fact, Conclusions of Law and Order for Judgment

To defendant above named, and Messrs. Stinchfield, Mackall, Crounse & Moore, its attorneys:

You, and each of you, will please take notice, that on the 27th day of June, 1942, the above court, by Honorable W. W. Bardwell, made, entered, and filed its Findings of Fact, Conclusions of Law and Order for Judgment in favor [fol. 1128] of plaintiff and against defendant.

Dated June 29, 1942.

T. O. Streissguth and Leonard, Street & Deinard, Attorneys for Plaintiff, 1036 Andrus Building, Minneapolis, Minnesota.

In District Court of Hennepin County

Findings of Fact, Conclusions of Law and Order for Judgment

The above entitled case being regularly on the General Term Calendar of the above court came on for trial on May 9, 1939, before the undersigned, one of the judges of the above court, and was tried without a jury on said day, and on May 10, 11, 12, and June 1, 2, and 10, 1939. T. O. Streissguth, and Messrs. Leonard, Street and Deinard by Hyman Edelman, appeared on behalf of plaintiff, and Messrs. Stinchfield, Mackall, Crounse, McNally and Moore by Fred H. Stinchfield and John M. Palmer, appeared on behalf of defendant. On April 18, 1940, this court made and filed Findings of Fact, Conclusions of Law, and Order for Judgment herein, directing entry of judgment in favor of plaintiff and against defendant. On May 4, 1940, defendant interposed its motion to amend said Findings of Fact, Conclusions of Law, and Order for Judgment, or, in [fol. 1129] the alternative, for a new trial. On May 6, 1940, this court made and filed its order, denying said motion, except for a minor correction. Said Findings of Fact, Conclusions of Law, and Order for Judgment sustained recovery by plaintiff on the ground of defendant's violation of the Blue Sky Law and the tolling of the Statute of Limitations. Therefore, the court found it unnecessary at that time to make Findings on Plaintiff's claim of express fraud, fraud by implied representation, and fraud by suppression and concealment of material facts. Thereafter, defendant appealed to the Supreme Court of Minnesota from the order of this court, dated May 6, 1940, denying its motion for amended Findings, or in the alternative for a new trial and from judgment entered in favor of plaintiff and against defendant, on June 18, 1940. The only issue involved in said appeal was the construction of the tolling statute, Mason's Minnesota Statutes, 1927, Section 9200. On January 10, 1941, the Supreme Court of Minnesota reversed said order and judgment "without prejudice," however, "to the issues other than that of the tolling of the Statute of Limitations." Thereafter, and on April 9, 1941, plaintiff moved this court for an order supplementing and correcting the Findings of Fact, Conclusions of Law, and Order for Judgment made and entered on April 18, 1940, so as to secure determination of the issues of ex-

press fraud, fraud by implied representations, and fraud by suppression and concealment of material facts. On May 16, 1941, plaintiff filed her Notice of Supplemental [fol. 1130] Motion for Additional Supplemental Findings of Fact and Conclusions of Law with respect to the applicability of Laws of Minnesota, 1941, Chapter 547. On May 14, 1941, defendant filed its motion to amend the Findings of Fact, Conclusions of Law, and Order for Judgment, dated April 18, 1940, in the particulars specified in said Notice of Motion, and for leave to argue the remaining issues of fraud and Statute of Limitations applicable thereto, and in connection with said motion defendant renewed its motions made at the conclusion of the trial, appearing in the typewritten transcript and settled case herein, at pages 466-475, to strike certain items of evidence referred to in said motions, upon the grounds therein enumerated. All of said motions were argued on May 19, 1941, and thereafter written briefs were submitted by the parties. The court having heard the testimony, arguments of counsel, and having examined the briefs filed herein, and being duly advised in the premises, hereby makes the following

Findings of Fact

I

At all times herein mentioned plaintiff was, and now is, a resident of the city of Minneapolis, Hennepin County, State of Minnesota.

[fol. 1131]

II

The Chase National Bank of the City of New York (hereinafter called "the Bank") at all times herein mentioned was and now is a national banking association, organized under the provisions of the Act of Congress commonly known as the National Banking Act, and engaged in the banking business, with its banking houses and offices located and its general business conducted, in the city of New York, state of New York. On March 21, 1917, the Bank was capitalized at $10,000,000, consisting of 100 000 shares of stock of the par value of $100.00 each.

III

Defendant (sometimes hereinafter called "the Corporation") was organized under the Business Corporation Law

of New York on May 26, 1917, and ever since has been and now is a New York corporation. The significant features of its charter will be summarized. The powers conferred on the corporation are comprehensive in scope, including authority to deal in securities. The amount of its capital was fixed at $2,500,000; no-par value shares to the number of 100,000 were to be issued; and the consideration for which it might issue and sell these shares was fixed at $25 a share. No share of its stock, issued to the Bank's stockholders, nor any interest therein, should "be sold, pledged, or otherwise disposed of or transferred, either voluntarily, by operation of law or otherwise, except in each instance and from time [fol. 1132] to time together with a transfer to the same person or persons of a like interest in an equal number of shares of stock of said Bank. The sale, pledge or other disposition or transfer of any shares of stock of the Bank or any interest therein, either voluntarily, by operation of law or otherwise, by or in behalf of any such stockholder of the Bank or anyone claiming from or through such stockholder, either directly or by mesne transfers shall, if and to the extent that effect may then be given by law to this provision, operate ipso facto as a transfer to the same person or persons of a like interest in an equal number of shares of the stock of this corporation. All persons receiving shares of its stock as stockholders of the Bank, and those claiming under or through them, should and did irrevocably designate and appoint the "depositary with which shares of this corporation and of the Bank are deposited to insure their transfer together * * * their agent, in case of the sale, pledge, or other disposition or transfer of a share or shares of said stock of the Bank or of this corporation, or any interest therein, * * * to transfer to the same person or persons a like interest in an equal number of shares of this corporation or of the Bank, as the case may be, and to do and perform any and all acts to effectuate such transfer." The foregoing provisions might be modified or terminated by the affirmative action of the registered holders of at least seventy-five per cent (later reduced to 66⅔) of the shares of stock of the Bank and of the Cor- [fol. 1133] poration then outstanding and so deposited. The foregoing provisions should be stated in the certificates of stock of the Corporation.

IV

The mechanics of arranging the affiliation between the Bank and the Corporation, contemplated by its charter, will be summarized.

Before organization of the Corporation, an agreement (herein called "the deposit agreement") dated March 21, 1917, had been entered into between all the Bank stockholders, a committee of such stockholders (herein called the "Committee") and Bankers Trust Company of New York. Pursuant to the terms of the deposit agreement the Bank stockholders deposited all of their certificates with the Committee.

The Bank paid a special dividend of $25 a share, aggregating $2,500,000, which the Committee received. The Committee organized the Corporation, and used the fund of $2,500,000 to pay the Corporation for the 100,000 shares of its stock. Stock certificates of the Corporation were issued in the names of the depositing Bank stockholders for the same number of shares as their Bank stock. These certificates were deposited with Bankers Trust Company along with the shares of the Bank stock which the Committee had been holding; Bankers Trust Company took them as depositary for the Committee. As occasion called for the transfer of shares, new certificates would be issued, but these new certificates were printed on a single sheet, [fol. 1134] on one-half a certificate for shares of the Bank stock, and on the other half a certificate for shares of the Corporation stock, and on the reverse side of the sheet were the usual printed forms for the transfer thereof. Bankers Trust Company issued to the depositing Bank stockholders receipts for their stock in the Bank and the Corporation, pursuant to the terms of the deposit agreement.

These receipts contained the following provision with reference to the deposited shares: "Neither said shares of the Bank nor said shares of the Securities Corporation are transferable separately, but this receipt and all rights and interests represented hereby are transferable by the registered holder, either in person or by attorney duly authorized on the books of the depositary kept for that purpose, upon surrender of this receipt duly assigned, which assignment shall transfer all right, title and interest of the depositor in the deposited shares. By delivering

this receipt to the depository for transfer the holder thereof irrevocably constitutes and appoints the depositary attorney to surrender the certificates for the deposited shares and to receive from the Bank and from the Securities Corporation respectively in exchange therefor certificates of stock for the deposited shares registered in the name of the transferee hereof as entered upon the records of the depositary, and hereby irrevocably authorizes the depositary to hold the same subject to the provisions of the deposit agreement."

[fol. 1135] The receipts contained a printed form for the joint transfer of the deposited shares of stock of the Bank and of the Corporation represented by the receipts, and an irrevocable appointment of Bankers Trust Company as attorney for the person named in the receipt, to transfer the certificates for the deposited shares. The form included also a transfer of the receipt "and all rights and interests represented thereby."

By the provisions of defendant's charter and the deposit agreement, the shares represented by the receipts were linked together for sale and holding in such manner as to make the shares in one corporation non-transferable separately, and to make the ownership, sale, purchase, or transfer of shares in one corporation absolutely conditioned upon identical ownership, sale, purchase or transfer of shares of the other.

After the initial deposit, when the capital stock of the Bank was increased from time to time, an equal number of additional shares would be authorized and issued by the Corporation, and certificates for the new Bank shares and the new Corporation shares deposited with Bankers Trust Company, and receipts therefor issued to the persons entitled thereto.

V

The mechanics of issuance and transfer of Bankers Trust Company receipts will be summarized.

Between 1917 and January, 1930, certificates of shares [fol. 1136] of the Bank and of the Corporation issued in the names of the persons designated in the outstanding Bankers Trust Company receipts were at all times in the custody of Bankers Trust Company in New York City. When an outstanding receipt was transferred, and surrendered by the transferee to Bankers Trust Company,

the certificate for the shares of the Bank and of the Corporation represented by the surrendered receipt would be transferred by Bankers Trust Company under the power contained in the deposit agreement, to the transferee of the receipt, and a certificate for the shares of the Bank and of the Corporation would be issued in the name of the transferee and deposited with Bankers Trust Company, which would in turn issue to the transferee a new receipt therefor in the form already described. The receipt-holders, in whose names the deposited shares stood, were at all times recognized by the Bank and by the Corporation as their respective stockholders of record, entitled to vote the same, and to receive all dividends declared thereon.

VI

By an agreement dated January 15, 1930, between Bankers Trust Company and the receipt-holders, designed to eliminate the expense incident to the use of such receipts, provision was made for the withdrawal of the receipts and the substitution of new "duplex" certificates to be issued by the Bank and by the Corporation to their stockholders. These duplex certificates were likewise printed on a single [fol. 1137] sheet, on one side a certificate for shares of the Bank stock, on the other side a certificate for an equal number of shares of the Corporation stock, each certificate bearing a legend restricting the holder from selling, pledging or otherwise disposing or transferring, "any share or interest therein in either corporation without at the same time transferring to or vesting in the same party an equal number of shares, or the same interest therein, in the other." and with one printed form for joint transfer. Thereafter the Bankers Trust Company receipts were retired, and in place thereof each stockholders received a new "duplex" certificate for the shares of the Bank and of the corporation represented by the receipt.

Hereinafter for brevity, both the Bankers Trust Company receipts and the "duplex" certificates will be called "Chase units."

VII

Defendant was organized and its stock inextricably bound up with the stock of the Bank, as has been described, at the instance of the Bank, its officers and shareholders acting as such, for the purpose of enabling the Bank and

its stockholders to engage in business and stock operations, and to buy, hold, or sell its own capital stock.

VIII

By amendment of its Articles of Incorporation, defendant's corporate name was changed from Chase Securities [fol. 1138] Corporation to "The Chase Corporation" in the year 1933. Thereafter, in the year 1934, its corporate name was again changed from the Chase Corporation to "Amerex Holding Corporation," which name ever since has been and still is its corporate name.

IX

On March 22, 1928, pursuant to application made by it, defendant secured a broker's license issued to it by the Securities Division of the Department of Commerce of Minnesota, commonly known as the "Commission," under and in accordance with the provisions of Chapter 192, Session Laws of Minnesota for 1925, as amended, commonly known as the "Blue Sky Law." By successive annual applications defendant secured renewal broker's licenses for succeeding years. Said licenses authorized it to transact a lawful securities business as a broker within the state of Minnesota, subject to the provisions of said law, for annual license periods ending March 21, 1929, 1930, 1931, and 1932.

Defendant, pursuant to the requirements of Section 3996-11, Mason's Minnesota Statutes, 1927, before being so licensed, and on March 17, 1928, appointed the Commissioner of Securities of Minnesota and his successor in office, its attorney for the service of process in any action or proceeding against it, in relation to or involving any transaction covered by said "Blue Sky Law."

[fol. 1139] X

During the year 1928 defendant as such licensed broker appointed eight persons as its agents in Minnesota, and procured agent's licenses for them from the Commission.

During the year 1929, defendant procured the renewal of seven of said eight licenses and one additional agent's license, and thereafter by successive annual applications procured renewal agent's licenses for succeeding years. During 1928, 1929 and 1930, its licensed agents were author-

ized to sell, offer for sale and solicit the sale of lawful securities on its behalf within the state of Minnesota.

XI

Defendant was also licensed as a foreign corporation on June 5, 1930, to do business in Minnesota, and continued so to be licensed until it filed a resolution of withdrawal on June 30, 1931, under and pursuant to Section 7494, Mason's Minnesota Statutes, 1927. Upon filing said resolution of withdrawal defendant appointed the Secretary of State its agent for service of process "in any action or proceeding of any nature or kind arising out of or involving anything done or omitted by said foreign corporation in this state while licensed to do business here."

XII

From March, 1928, until July, 1931, defendant maintained offices within the state of Minnesota, fully staffed and equipped with furniture, supplies, and wire system, [fol. 1140] and was actually and continuously present and resident in the state of Minnesota, and doing business therein, and was engaged in the securities business therein, including the sale of stocks, shares, bonds, debentures and other securities directly and through its agents, in the course of continued and successive sales, and in the business of purchasing and acquiring directly and through its agents, securities for the purpose of re-selling the same to others, and generally of buying, selling, otherwise dealing or trading in, promoting, negotiating, advertising and distributing such securities, under said broker's license, and defendant's agents were representing it in the state of Minnesota, and were engaged therein on its behalf in the selling, offering for sale and solicitation of the sale of securities.

As a part of its said business in the state of Minnesota, defendant was, during the entire year 1929, and for some time thereafter, engaged in the sale and disposition for value, offering for sale, and solicitation of the sale of Chase units, then in the form of Bankers Trust Company receipts.

XIII

On or about August 8, 1929, at Minneapolis, Minnesota, defendant through one Weir Jepson, its agent duly author-

ized by it, solicited plaintiff to purchase and offered to and did sell to plaintiff eight Chase units, at a single indivisible purchase price of $1,828.00, which plaintiff paid to defend-
[fol. 1141] ant at Minneapolis on August 23, 1929. Bankers Trust Company's receipt, dated on or about September 9, 1929 (which was received in evidence as Plaintiff's Exhibit L) evidencing said eight Chase units, was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about September 10, 1929.

Following the delivery of said receipt, a similar receipt, dated February 3, 1930 (which was received in evidence as Plaintiff's Exhibit M) for one Chase unit, was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about February 3, 1930. This receipt represented a stock dividend of 12½% declared by defendant and the Bank upon merger with National Park Bank, to all their stockholders of record as of August 23, 1929.

XIV

On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Company receipt, a duplex certificate for nine units, No. F 52498, which was offered and received in evidence as Plaintiff's Exhibit N.

On August 12, 1936, defendant issued to plaintiff, in exchange for said duplex certificate, two certificates, one for nine shares of Bank stock, being Certificate No. 170 762, which was offered and received in evidence as Plaintiff's Exhibit P, the other a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to defendant
[fol. 1142] of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067 711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

XV

In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of Mason's Minnesota Statutes, 1927, Chapter 21-b; that the solicitation, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws

and statutes of the state of Minnesota and the United States of America, and constituted a legal and valid solicitation, offer and sale of said Chase units; that said Chase units were in all respects valid, legal and genuine; that it and its agents were duly licensed to solicit, offer for sale and sell said Chase units in the state of Minnesota.

XVI

Plaintiff offered to buy and defendant offered to sell said Chase units at the market price and in selling said Chase units to plaintiff defendant represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at [fol. 1143] which plaintiff purchased said units from defendant was determined by lawful and legitimate factors of supply and demand and was free from any manipulation or control by defendant.

XVII

In selling said Chase units to plaintiff, defendant fraudulently and wilfully suppressed the facts concerning the nature and formation of said Bank and its affiliate, Chase Securities Corporation, and fraudulently and wilfully concealed and suppressed the fact that said Chase units were not registered for sale within the state of Minnesota, and were illegally sold therein and that its agent Weir Jepson was not licensed to offer for sale or to sell said Chase units within the state of Minnesota, and fraudulently and wilfully concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price of said Chase units and fraudulently and wilfully concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market.

XVIII

Plaintiff, in purchasing said Chase units, had no notice or knowledge of the facts concealed from her as aforesaid, and believed the statements and representations, and each

[fol. 1144] of them, so made to her, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the state of Minnesota, and believing and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew.

XIX

By the provisions of said Blue Sky Law, Chase units were required to have been registered as therein provided, before being offered for sale or sold within the state of Minnesota. Defendant, in violation and contravention of said law and the duties imposed upon it, wilfully and fraudulently failed to register the Chase units according to the requirements of said law, and the Chase units were never registered or licensed to be sold in Minnesota, and the sale thereof was never authorized in Minnesota by registration under said law. The Chase units never were within any of the classifications of securities exempted from registration under Section 3996-2 of Chapter 21-b, Mason's Minnesota Statutes, 1927, and were never exempted from the operation of the provisions of said law, and the sale thereof was never authorized in Minnesota by exemption from said law. The sale of Chase units to plaintiff was not within any of the classifications of exempted sales specified in [fol. 1145] Section 3996-3 of said Chapter, and was not in fact excepted from the operation of said law, nor authorized by any provision of law. Said sale to plaintiff was not an isolated sale, but was made in the course of repeated and successive sales of Chase units by defendant, which was, at the time of said sale, offering Chase units for sale, soliciting the sale thereof, and selling the same to the public generally. Defendant never applied to the Commission for the registration of Chase units or of its own capital stock, nor did it ever notify said Commission of its intention to sell Chase units or its own capital stock, and it never in fact at any time secured the license or approval of said Commission to sell, offer to sell, solicit the sale of, or

attempt to sell, or negotiate or dispose of Chase units or its own capital stock.

Defendant at all times mentioned herein, knew and was familiar with the requirements of said Blue Sky Law and wilfully failed to register the Chase units or its own stock.

As hereinafter more specifically found, for a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the Commission to enable it to determine whether said securities [fol. 1146] should be registered and to properly pass on an application for registration, and, with such knowledge, attempted to evade the law requiring Chase units to be registered and licensed.

XX

By the provisions of said Blue Sky Law, defendant's agents were forbidden to sell or offer for sale any securities within the state of Minnesota unless and until such agents had received agent's licenses from the Commission in accordance with the provisions of said law. At the time of said transaction with plaintiff, defendant's agent, Weir Jepson, had not been licensed as an agent by the Commission. Defendant at no time filed with the Commission any appointment or designation of said Weir Jepson as its agent, and never obtained from the Commission any agent's license for him, but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others in the state of Minnesota in the course of successive and repeated sales thereof within the state of Minnesota.

XXI

The sale by defendant through its unlicensed agent to plaintiff of said unregistered Chase units was ma in Minnesota, in violation of the provisions of said Blue Sky Law and was illegal, and void, and incapable of ratification or confirmation as between the original parties to the sale. [fol. 1147] Because of the linking together of shares of

Bank stock and shares of the Corporation's stock, and because an entire indivisible purchase price was required to be paid and was paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was wholly illegal and wholly void.

XXII

At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to bona fide bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant, as hereinafter more particularly set forth.

XXIII

Prior to January 12, 1928, the stock of the Chase National Bank was listed on the New York Stock Exchange, and on said date was delisted at the request of said Bank. The stock of the Chase Securities Corporation was never listed on said New York Stock Exchange. After January 12, 1928, said units were traded in exclusively on the over-the-counter market maintained by defendant.

[fol. 1148]

XXIV

At the time of the sale of said units by defendant to plaintiff, and for a considerable time prior and subsequent thereto, defendant was engaged in a vigorous and extensive campaign for the retail sale of said units to the public, for the purpose of creating a larger clientele to whom defendant could sell and distribute stocks, bonds, and other securities from time to time at a profit.

XXV

At all times herein mentioned, Metpotan Securities Corporation was a corporation organized and existing under the laws of the state of New York, and all of its capital stock was owned by defendant. All of the officers of said Metpotan Securities Corporation were likewise officers of defendant.

XXVI

On September 21, 1927, defendant, through its wholly owned subsidiary, Metpotan Securities Corporation, entered into a joint account or pool with McClure, Jones & Co., Potter & Co., and Blair & Co., to buy and sell Chase units. The letter and agreement confirming the organization of said pool was offered and received in evidence as Plaintiff's Exhibit A-25, and is hereby expressly made a part of these Findings with like effect as though fully set out herein. The pool originally was to run for a period of sixty (60) days, commencing September 21, 1927, but was subsequently continued until March 20, 1928, and again extended until [fol. 1149] April 18, 1928. During all of said period said Metpotan Securities Corporation was the pool manager and in direct charge and control of the operations of said pool. Said Metpotan Securities Corporation was financed by defendant, and defendant furnished to it credit necessary for the carrying on of said pool activities. On December 31, 1927, said Metpotan Securities Corporation was indebted to defendant on account of advances to it in connection with said pool activities in the sum of $3,235,000. During all of said period defendant, through Metpotan Securities Corporation, daily bought and sold large blocks of said units. During the period commencing with September 21, 1927, and up to April 18, 1928, said pool purchased 22,217 units ($100 par) for $13,240,356.32, which units were sold at a profit to the pool of $50,620.73. At the time the account was opened, the quotation for Chase Securities units ($100 par) was 575 bid, 580 asked; and on April 18, 1928, the date the account was closed, the quotation was 684 bid, and 690 asked.

XXVII

Immediately upon the close of this trading account, on April 18, 1928, another pool or trading account was formed with Metpotan Securities Corporation, Blair & Co., McClure, Jones & Co., and Potter & Co., as participants, and with Metpotan Securities Corporation and Blair & Co. carrying stock for this account. A letter from Metpotan Securities Corporation to Potter & Co., dated April 18, [fol. 1150] 1928, constituting the agreement defining the terms by which this pool was organized, was offered and received in evidence, marked Exhibit A-26, and is hereby

made a part of these findings with like effect as though fully set out herein. As in the earlier pool, the Chase Securities Corporation financed the activities of the pool by advancing and loaning to Metpotan Securities Corporation such moneys as were required from time to time for that purpose. On December 31, 1928, Metpotan Securities Corporation was indebted to defendant on account of such advances in the amount of $3,461,000. 59,552 shares were purchased by this syndicate or pool at a total cost of $50,180,175.30, and the pool continued its operations until April 9, 1929, and during its existence all of said shares were resold by the pool, with a profit of $554,760.42. The average price to the pool and its members was about $800 per unit, the price of the stock having risen during the life of the pool from an interim low of $435 per unit.

XXVIII

On April 10, 1929, another pool in the stock of the Chase National Bank and Chase Securities Corporation was formed, with Metpotan Securities Corporation, McClure, Jones & Co., Broomhall, Killough & Co., Inc., and Potter & Co., as participants. A letter dated April 10, 1929, from Metpotan Securities Corporation to Broomhall, Killough & Co., Inc., constituting the agreement defining the terms by which said pool was organized, was offered and received [fol. 1151] in evidence, marked Exhibit A-27, and is hereby expressly made a part of these findings with like effect as though fully set out herein. Said pool was managed and controlled by Metpotan Securities Corporation. 12,630 units of $100 par value stock, and 442,934 units of $20 par value stock were bought for $103,216,184.84, the money to effect these purchases being advanced by the Metpotan Securities Corporation and the defendant, Chase Securities Corporation. The account was terminated on July 3, 1930, with 38,440 units remaining in the account at an average cost to the participants of $167.85, the market price at that time being $140 per unit. The profit to the pool was $321,250.14.

XXIX

On July 19, 1929, defendant caused to be formed another pool in Chase units with Dominick & Dominick, as pool

managers (Exhibits A-28, A-33, A-34). Dominick & Dominick was a banking house which in 1929 had a stock commission business in the city of New York and held a membership on the New York Stock Exchange. This pool was formed on July 19, 1929, on the basis of an original allotment of 25,000 shares, with full discretionary powers granted to Dominick & Dominick to operate and manage the pool. An option was given by defendant to said pool managers to purchase from it 80,000 shares for the operations of the pool on the following scale of ascending prices:

[fol. 1152] 20,000 shares at $210 per share
10,000 shares at $220 per share
10,000 shares at $225 per share
10,000 shares at $230 per share
10,000 shares at $235 per share
10,000 shares at $240 per share

(Exhibits A-28, A-33).

At the time of the giving of said options, the price of said Chase units was at or below the lowest price specified in said option.

As pool managers, pursuant to agreement with defendant, Dominick & Dominick had the sole management and charge of the entire conduct of the business and affairs of the pool, with all the usual powers granted to a pool manager, including the right on behalf of the pool to make or procure loans and to pledge the obligations of the pool participants therefor, to pay all commissions and expenses of every nature, and on behalf of the pool, to purchase, sell, sell short, repurchase, resell or hold Chase units, in such amounts and at such prices, and in such manner as they might deem advisable, and generally to act in all respects as in their opinion might be to the best interests of the pool provided, only, that the pool at no time was to be short or long, or to be committed for an amount in excess of 25,000 units. In addition to being the managers of the pool, Dominick & Dominick were participants in the profits, along with the other participants in the pool, including defendant. In order to prevent stock which was distributed by the pool managers to the participants for [fol. 1153] retail distribution from coming back onto the market so as to interfere with pool sales operations, a

penalty of $2 per unit was assessed against any participants for each unit of stock which was repurchased in the market by the pool during the period of the pool at or below the price at which it was originally taken down from the pool by the participants. Dominick & Dominick exercised the option to purchase and purchased from defendant and its affiliate corporations, Chase units in the quantities and at prices specified in the option letters (Exhibits A-28 and A-33) at a profit to the sellers of said Chase units of an amount in excess of one million dollars. The pool ran from July 19, 1929, to November 11, 1929. During that time 172,806 units were bought and 115,483 units were sold. 55,227 units were distributed to the participants. The profits accruing to the pool amount to $1,452,314.68, and defendant received $261,416.64 as its share of said pool profits.

XXX

During the year 1928, defendant and its wholly owned subsidiary Metpotan received profits from pool activities in Chase units in the amount of $726,846.01, and received profits from said pool activities in Chase units during the year 1929 in the amount of $1,801,769.99. The following is a schedule showing purchases and sales by defendant and Metpotan of Chase units in 1928 and 1929:

[fol. 1154]

Chase Units (Old)	Purchases		Sales	
	Shares	Money	Shares	Money
1928	71,869	$45,973,648.08	70,758	$45,753,743.55
1929	61,106	$66,044,849.87	61,623	65,804,381.48
Chase Units (New)				
1929	716,000.6	150,692,148.92	684,709	145,815,916.83
Chase National Bank and Chase Securities Corporation Rights				
1928	74,272	3,942,521.46	74,275	3,942,651.92
1929	67,230.2	9,364,195.29	67.229.2	9,364,125.88

In 1928 and 1929 Chase, through its pools, bought and sold shares and rights involving a total volume of over a half billion dollars.

XXXI

During the years 1928 and 1929, the defendant itself and through its wholly owned subsidiary and adjunct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts for the purpose of dealing in its own capital stock. Defendant participated in said pools and the trading accounts through its wholly owned subsidiary, Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a con- [fol. 1155] venience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which defendant was thereby able to exert on the over-the-counter market for said units, and the price at which said units were sold to the public.

By reason of said pools and defendant's participation therein, an appearance of great interest and activity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools.

Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant

and its associates, and by information disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the securities on the part of the purchasing [fol. 1156] public was created, and plaintiff was induced to purchase said units upon such misleading appearance so fraudulently created. The quoted price of said units at the time of plaintiff's purchase of the same was not a true and genuine price arrived at by lawful and legitimate factors of supply and demand in a free market, but, on the contrary, the market appraisal of said units was wrongfully manipulated and controlled by defendant through the medium of said pools and trading accounts.

XXXII

Plaintiff did not discover the falsity of defendant's statements and representations or any of them nor did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts concealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action, notwithstanding due diligence on her part.

In so far as plaintiff's cause of action is founded on representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for "relief on the ground of fraud," in which case, as provided in Mason's Minnesota Statutes 1927, Section 9191, the cause of action is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Plain[fol. 1157] tiff not having discovered the facts constituting defendant's fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the state of Minnesota.

In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, Secs. 3996-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of

an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the state of Minnesota.

XXXIII

Promptly upon discovery of the illegality of said sale, and on or about October 11, 1937, plaintiff formally repudiated said transaction and demanded a refund and return to her of the purchase price thereof, with interest, and tendered to defendant her certificates of stock, together with dividends and other income received by plaintiff therefrom, with interest. Defendant rejected said tender and refused to recognize plaintiff's repudiation of said transaction. In her complaint in this action and upon the trial, plaintiff renewed her tender and it was again refused by defendant. Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff [fol. 1158] that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest.

XXXIV

Plaintiff from time to time before said discovery, as well as after said tenders and refusals thereof, received and accepted dividends upon said stock as follows:

Dividends on Chase units:	
October 1, 1929	$8.00
January 1, 1930	8.00
April 1, 1930	9.00
July 1, 1930	9.00
October 1, 1930	9.00
January 2, 1931	9.00
April 1, 1931	9.00

July 1, 1931	9.00	
October 1, 1931	9.00	
January 2, 1932	9.00	
April 1, 1932	6.75	
July 1, 1932	4.50	
October 1, 1932	4.50	
January 2, 1933	4.50	
April 1, 1933	4.50	
[fol 1159]		
July 1, 1933	3.15	
October 1, 1933	2.99	
January 2, 1934	2.99	
April 1, 1934	3.15	
August 1, 1934	4.23	
February 2, 1935	6.30	
August 1, 1935	6.30	
February 1, 1936	6.30	$148.16

Dividends on Chase National Bank stock:

August 1, 1936	$6.30	
February 1, 1937	6.30	
August 1, 1937	6.30	
February 1, 1938	6.30	
August 1, 1938	6.30	
February 1, 1939	6.30	$ 37.80

Dividends on Amerex Holding Corporation stock:

July 15, 1936	$ .50	
February 1, 1937	.50	
August 1, 1937	.50	
February 1, 1938	.70	
August 1, 1938	.70	
February 1, 1939	.70	$ 3.60

The total of the dividends so received up to and including June 10, 1939, was $189.56.

[fol. 1160] XXXV

By reason of the premises, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of

$1,828.00, together with interest thereon at the rate of six per cent (6%) per annum from and after August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof.

XXXVI

Subsequent to the time plaintiff purchased the said Chase units, there were numerous changes in the capitalization of the bank and of defendant, as set forth in paragraph XI, subdivision 8 of defendant's answer. Such changes were not confined to the individual shares sold to plaintiff, but affected all of the capital stock of both corporations. The changes resulted from action of the bank and/or defendant or their respective stockholders in the course of the operation of the bank or defendant. They could be made without the consent of the owners of any particular shares. Plaintiff from time to time was advised of such changes, but she did not actively participate therein, except as she acted as a stockholder before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither [fol. 1161] plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing.

XXXVII

Except as hereinbefore specifically found, the court finds the allegations of defendant's answer not true and not sustained by the evidence, and defendant's motion for amended findings and conclusions of law, and defendant's motion to strike certain items of evidence (as appears from defendant's notice of motion dated May 1, 1941, on file herein) are in all things denied.

As

Conclusions of Law,

the court finds that:

1. Plaintiff is entitled to judgment against defendant in the sum of $1,828.00, plus interest thereon, at the rate

of six per cent per annum from August 23, 1929, less the sum of $189.56 (the total of dividends received by plaintiff from defendant), together with interest on each dividend item at the rate of six per cent per annum from the date of receipt thereof by plaintiff (said dividends and dates of receipt thereof by plaintiff are set forth in paragraph XXXIV of the foregoing findings of fact), together with her costs and disbursements herein.

2. Upon satisfaction by defendant of said judgment, [fols. 1162-1163] plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, certificate No. 170 762 for 9 shares of common stock in Chase National Bank of the City of New York, and certificate No. 067 711 for 1 share of common stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificates shall, upon exception of proper receipt therefor, be delivered to defendant; and plaintiff shall, in addition, deliver or pay to said clerk for delivery and payment to defendant, all dividends received by her on said stock since June 10, 1939, with interest at the rate of six per cent per annum from the date of the receipt thereof by plaintiff.

Let judgment be entered accordingly.

Dated June 27, 1942.

By the Court, W. W. Bardwell, Judge.

Stay of 40 days. B.

[fol. 1164] In District Court of Hennepin County

Notice of Motions to Amend Findings of Fact and Conclusions of Law and for Order for Judgment for Defendant, or in the Alternative for a New Trial

To the plaintiff above named and to Messrs. Streissguth & Gislason, and Leonard, Street & Deinard, her attorneys:

You and each of you will please take notice, that on the 16th day of September, 1942, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, at the court house in the city of Minneapolis, above county and state, defendant will move the court for orders in its favor upon the following alternative motions:

1. Motion to amend the findings of fact, conclusions of law and order for judgment, made and entered on June 27,

1942, and to enter judgment in accordance with the amended findings of fact and conclusions of law; or, in the alternative,

2. Motion for a new trial;

which said motions are fully set forth in the formal written motions attached hereto and made a part hereof.

Said motions will be made upon the transcript of the testimony and the settled case herein, upon all the grounds set forth in the written motions attached, and upon all the [fol. 1165] files, records and proceedings herein.

Dated September 8, 1942.

Stinchfield, Mackall, Crounse & Moore, 1100 First National-Soo Line Building, Minneapolis, Minnesota, Attorneys for Defendant.

In District Court of Hennepin County

Motions to Amend Findings of Fact and Conclusions of Law and for Order for Judgment for Defendant, or in the Alternative for a New Trial

I

Motion to Amend Findings of Fact, Conclusions of Law and for Judgment for Defendant

Comes now defendant and, pursuant to the attached notice of motions, moves the court for an order amending the findings of fact and conclusions of law made and entered herein on June 27, 1942, and to enter judgment in accordance with the amended findings of fact and conclusions of law, in the following respects:

1. By striking therefrom finding VII and substituting in lieu thereof the following:

"VII

"Defendant was organized and its stock inextricably bound up with the stock of the bank, as has been de- [fol. 1166] scribed, at the instance of the shareholders of the bank, for the purpose of enabling such shareholders to profit by defendant's engaging in the securities business in which the bank itself could not engage."

2. By striking therefrom finding XII and substituting in lieu thereof the following:

"XII

"During the period while defendant was licensed as aforementioned in Minnesota, it engaged in the business of buying and selling securities, including the Chase units, to residents of the state of Minnesota, among others. It maintained three offices in Minnesota, located in St. Paul, Duluth and Minneapolis, staffed with salesmen duly licensed under the Blue Sky Law of Minnesota and equipped with office furniture and equipment. The offices in Minnesota were under the control of and subordinate to an office of defendant in Chicago, Illinois. The sale of Chase units was customarily handled in the following manner: a salesman working out of one of the Minnesota offices would receive an order from a customer in this state; the order would be transmitted by telephone, telegraph or mail to the Chicago office; the Chicago office would then wire the order to the New York office of defendant, which in turn would advise the Chicago office when, and the price at which, the order had been filled; the Chicago office [fol. 1167] would then send a confirmation in writing to the customer; in a majority of cases payment would be made by a remittance of the customer directly to the Chicago office, but the local Minnesota office in many instances accepted payment from customers and remitted the same to the Chicago office; the security was mailed by the Chicago office direct to the customer or to the Minneapolis office for delivery by it to the customer; in some cases, as in that at bar, the security would be sent to the customer's local bank with draft attached and the local bank would remit to defendant for the customer."

3. By striking therefrom the first paragraph of finding XIII and substituting in lieu thereof the following paragraph:

"On or about August 9, 1929, one Weir Jepson, a salesman of defendant licensed as an agent of defendant in the state of Iowa, without the knowledge or consent of defendant, solicited plaintiff in Minneapolis, Minnesota, and offered to sell to plaintiff eight Chase

units, at a single indivisible purchase price of $1,828.00; that plaintiff placed an order for said Chase units at that price with said Weir Jepson; that through connivance with one Owen C. Devine, then the manager of the Minneapolis office of defendant, said order was entered in the records of defendant as having been solicited by said Owen C. Devine rather than said [fol. 1168] Weir Jepson; that said order was mailed by the Minneapolis office to the Chicago office of defendant bearing the name of Owen C. Devine as salesman; that several days later plaintiff received through the mail from defendant's Chicago office a written confirmation of the order; that thereafter and on or about August 23, 1929, defendant's Chicago office mailed Bankers Trust Company's receipt for said Chase units to First National Bank of Minneapolis, Minnesota, for delivery to plaintiff upon payment of said purchase price; that plaintiff paid said First National Bank of Minneapolis said purchase price and received said receipt from said bank, and said bank remitted the payment to defendant's Chicago office; that the Minneapolis office of defendant participated in the transaction only in the taking of the order for said security and the transmitting of it by mail to its Chicago office and that the remaining steps in said transaction and the sale itself were consummated by mail between plaintiff and defendant's Chicago office and was outside of the state of Minnesota and in interstate commerce; that neither defendant's Chicago or New York offices, to which its Minneapolis office was responsible, ever knowingly sanctioned or ratified the solicitation of said order by said Weir Jepson and in fact had no knowledge of his participation in said transaction,"

or in the alternative, if the court denies the above motion [fol. 1169] as to this finding, that there be stricken from said finding the words, "duly authorized by it," appearing in the first sentence of said finding.

4. By striking therefrom finding XIV and substituting in lieu thereof the following:

"XIV.

"On November 6, 1930, the bank issued to plaintiff, in exchange for her Bankers Trust Company receipt, a

duplex certificate for nine units No. F52498, which was offered and received in evidence as Plaintiff's Exhibit N.

"On August 2, 1936, the bank issued to plaintiff, in exchange for said duplex certificate one certificate for nine shares of bank stock, being certificate No. 170 762, which was offered and received in evidence as Plaintiff's Exhibit P. At the same time plaintiff was entitle to a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to the bank of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067 711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

"The exchange of the duplex certificate for separate shares in the bank and defendant was occasioned by the termination of the affiliation between the bank and defendant as follows: On May 17, 1933, the certificate of [fol. 1170] incorporation of defendant was amended to provide that thereafter the defendant should not, either directly or indirectly, engage in the business of publicly buying or selling securities; the par value of defendant's shares was reduced from $5.00 to $1.00 per share, and the capital of defendant was reduced from $37,000,000 to $7,400,000; and the name of the corporation changed from 'Chase Securities Corporation' to 'The Chase Corporation.' On June 15, 1934, the certificate of incorporation of defendant, then known as The Chase Corporation, was amended to eliminate the provision requiring its shareholders to be shareholders of the bank and forbidding transfer of shares in one corporation without joint and simultaneous transfer of shares in the other corporation, and the deposit agreement of March 21, 1917, was terminated. At about the same time, the par value of each share of defendant was increased from $1.00 to $10.00 and the number of outstanding shares was reduced from 7,400,000 to 740,000, and the name of defendant was changed from "The Chase Corporation' to 'Amerex Holding Corporation.'"

5. By striking therefrom finding XV, or in the alternative, if the court denies the motion to strike said finding XV in its entirety, defendant moves that there be inserted in said finding, at the beginning thereof, certain words so that said first clause, down to the colon, shall read as follows:

> [fol. 1171] "By the mere act of selling said Chase units to plaintiff (and in no other respect or manner), defendant impliedly represented to plaintiff: "

6. By striking therefrom finding XVI, or in the alternative, if the court denies the motion to strike said finding XVI in its entirety, defendant moves that the finding in its present form be amended to state in specific language whether the representations by defendant referred to in said finding, were made "expressly" or "impliedly"; and that if the finding be amended to specify "implied" representations only, that the present form of finding be then further amended so that the first portion of the first sentence thereof, down to the colon, shall read as follows:

> "Plaintiff offered to buy and defendant offered to sell said Chase units at the market price and, by the mere act of selling said Chase units to plaintiff (and in no other respect or manner), defendant impliedly represented to plaintiff: "

7. By striking therefrom finding XVII.

8. By striking therefrom finding XVIII.

9. By striking therefrom finding XIX.

10. By striking from finding XX the following:

> "but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to [fol. 1172] offer for sale and sell Chase units to plaintiff and others in the state of Minnesota in the course of successive and repeated sales thereof within the state of Minnesota,"

and by renumbering it finding XV.

11. By striking therefrom finding XXI and substituting in lieu thereof a paragraph to be numbered XVI, as follows:

> "The sale by defendant to plaintiff of said Chase units was not consummated in the state of Minnesota

and was not in violation of the provisions of the Blue Sky Law of said state and was not illegal; that because of the linking together of shares of bank stock and shares of defendant's stock, and because an entire indivisible purchase price was required to be paid and was paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was exempt from the Blue Sky Law of the state of Minnesota as being stock of a national banking association, and the exempt character of said bank stock extended to the stock of defendant,"

or in the alternative, if the court denies the above motion as to this finding, defendant moves that there be stricken from said finding the words, "void, and incapable of ratification or confirmation," appearing in the first sentence of said finding and substituting in lieu thereof the word, "voidable," [fol. 1173] and by striking the words "wholly illegal and wholly void," appearing in the second sentence of said finding and by substituting in lieu thereof the words, "illegal and voidable," and by renumbering it finding XVI.

12. By striking therefrom finding XXII.

13. By striking therefrom finding XXIII.

14. By striking therefrom finding XXIV.

15. By striking therefrom finding XXV.

16. By striking therefrom finding XXVI.

17. By striking therefrom finding XXVII.

18. By striking therefrom finding XXVIII.

19. By striking therefrom finding XXIX.

20. By striking therefrom finding XXX.

21. By striking therefrom finding XXXI.

22. By striking therefrom finding XXXII and substituting in lieu thereof a paragraph to be numbered "XVII," as follows:

"That the summons and complaint in this action were delivered to the Commissioner of Securities as defendant's agent for service of process on November 22, 1937;

that said delivery and attempted service upon defendant was made more than six years after the sale of said Chase units."

[fol. 1174] 23. By renumbering finding XXXIII so that the number thereof shall be "XXIII" and by striking from said finding the words "Promptly upon discovery of the illegality of said sale, and," appearing in the first sentence thereof and by striking from said finding the following:

"Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest."

24. By renumbering finding XXXIV so that the number thereof shall be "XIX" and by striking from said finding the words, "said discovery," appearing in the first sentence thereof.

25. By striking therefrom finding XXXV.

26. By renumbering finding XXXVI so that the number thereof shall be "XX" and by striking therefrom the fol-
[fol. 1175] lowing:

"before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

"Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt

and acceptance of dividends, constitutes a waiver of such wrongdoing."

27. By striking therefrom finding XXXVII and substituting in lieu thereof the following paragraph to be numbered XXI:

"The court finds that the allegations of defendant's answer are true and sustained by the evidence, and defendant's motions for amended findings and conclusions of law, and defendant's motions to strike certain testimony and evidence (as appears from defendant's notice of motion dated May 14, 1941, on file herein) are in all things granted."

28. By adding to said findings the following findings of fact:

"XXII

"In connection with said sale, defendant made no false representations of fact, express or implied, to plaintiff with respect to the registration of said stock, [fol. 1176] the licensing of its agent, Weir Jepson, or any other material fact, nor did it by its words or conduct make any false representations, express or implied, to plaintiff, or create a false appearance with respect to any material fact.

"XXIII

"In connection with said sale, defendant did not hide, conceal or suppress any material fact from the plaintiff, nor did it engage in any course of conduct designed to hide or conceal any material facts from the plaintiff or designed to prevent and hinder the plaintiff from knowing and obtaining knowledge of all material facts.

"XXIV

"That plaintiff had full knowledge of all facts with respect to absence of registration of said stock and all other material facts regarding said sale to her more than six (6) years prior to the commencement of this action.

"XXV

"Except as hereinbefore specifically found, the court finds the allegations of plaintiff's complaint not true and unsubstantiated."

As to conclusions of law:

29. By striking therefrom the conclusions of law as found by this court and by substituting in lieu thereof the following:

[fol. 1177] "a. The only cause of action, if any, established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute' within the meaning of Section 9191, subdivision 2, Mason's Minn. Stat. 1927, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 547, Laws of Minn. 1941.

"b. There is no substantial evidence to establish a cause of action for relief on the ground of fraud, either express or implied, in favor of the plaintiff, and the action is not one for relief on the ground of fraud within the meaning of Section 9191, subdivision 6, Mason's Minn. Stat. 1927.

"c. There is no competent evidence from which the court would be justified in finding that the market for said Chase units was controlled and manipulated by defendant or by any person or persons and the matter relating to so-called market control and manipulation which was admitted subject to objection has been disregarded.

"d. Defendant's motions to strike the matter offered from the so-called Pecora reports, identified as Plaintiff's Exhibits A-55, A-56 and A57, and the matter [fol. 1178] offered from the Segal case are granted.

"e. That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

"f. That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

"g. That the shares of stocks of The Chase National Bank of the City of New York and Chase Securities Corporation were securities not subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities exempt therefrom.

"h. That plaintiff either discovered, or, with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted commencement of this action, and that the cause of action, if any, is barred by the statute of limitations.

"i. That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept [fol. 1179] service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action.

"j. That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

"k. That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structures of said Chase National Bank and defendant corporation which altered materially and substantially her interest in said corporation; that said changes preclude plaintiff from restoring defendant to status quo; and that any tender of stock or dividends thereon to defendant has been and is legally ineffectual to accomplish restoration of status quo to defendant.

"Let judgment be entered for defendant dismissing the action and against plaintiff for its costs and disbursements."

Said motion to amend the court's findings of fact, conclusions of law and order for judgment is made upon the transcript of the testimony and the settled case herein, and is based upon the following specific grounds:

1. That there is no competent evidence or any evidence in the case to support the findings of fact and [fol. 1180] conclusions of law or portions thereof, specified above, which defendant hereby moves to strike from the findings of fact and conclusions of law entered herein on June 27, 1942.

2. That each and every part of said findings of fact and conclusions of law, specified above, which defendant hereby moves to strike from the findings of fact and conclusions of law entered herein on June 27, 1942, is contrary to law.

3. That there is competent evidence in the case to support the amended findings of fact and conclusions of law above proposed by defendant; and that said proposed findings of fact and conclusions of law are in conformity with the applicable law.

4. That the only cause of action, if any, established by the evidence, is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the statute of limitations.

5. That the matter contained in the court's present findings of fact, conclusions of law and order for judgment, heretofore specifically referred to, which are inconsistent with and irrelevant to an action based on violation of statute, should be stricken.

6. That Section 18 of Chapter 547, Laws of Minne- [fol. 1181] sota 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat. 1927.

7. That there is no evidence to justify the court in finding that plaintiff had established a cause of action for relief on the ground of fraud, and Section 9191, subdivision 6, Mason's Minn. Stat. 1927, has no application to the case.

8. That the matter offered from the so-called Pecora report and Segal record is hearsay and incompetent matter and without proper foundation for introduction into evidence, and defendant's motions to strike said matter and all matter offered in connection with and related thereto should have been granted.

9. That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

10. That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

11. That the shares of stock of The Chase National Bank of the City of New York and Chase Securities [fol. 1182] Corporation were securities not subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities exempt therefrom.

12. That the Minnesota Blue Sky Law, if applied to said transaction between plaintiff and defendant, would deprive defendant of its property without due process of law, in violation of the provisions of Section 7 of Article 1 of the Constitution of the State of Minnesota, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

13. That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as being in contravention of Section 8, Article 1 of the Constitution of the United States of America, which confers upon Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

14. That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as impairing the obligations of simultaneous transfer of the shares of stock of the said The Chase National Bank of the City of New York with shares of stock of the Chase Securities Corporation provided for in the deposit agreement entered into

on about March 21, 1917, between the stockholders of the said bank, a committee of stockholders, and the Bankers [fol. 1183] Trust Company of New York, and provided for in the certificate of incorporation of the Chase Securities Corporation; both of which said contracts became effective prior to June 21, 1917, and prior to the effective date of the first Blue Sky Law of Minnesota.

15. That plaintiff's cause of action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations.

16. That plaintiff either discovered or with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted commencement of this action, and that the cause of action, if any, is barred by the statute of limitations.

17. That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action.

18. That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

[fol. 1184] 19. That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structures of said Chase National Bank and defendant corporation which altered materially and substantially her interest in said corporations; that said changes preclude plaintiff from restoring defendant to status quo; and that any tender of stock or dividends thereon to defendant has been and is legally ineffectual to accomplish restoration of status quo to defendant.

II

Alternative Motion for New Trial

Comes now defendant, and, pursuant to the attached notice of motions, if the above motion for amended findings

of fact and conclusions of law is denied, defendant moves the court for an order for a new trial upon the following grounds:

A. General:

1. Errors of law occurring at the trial and duly excepted to by defendant at the time and noted and preserved in the settled case and in the files, records and proceedings herein.

2. That the findings of fact filed herein are not justified by the evidence.

3. That the findings of fact filed herein are erroneous and [fol. 1185] contrary to law.

4. That the conclusions of law filed herein are not sustained by the findings of fact.

5. That the conclusions of law filed herein are contrary to law, and based on erroneous findings of fact.

B. As to Non-Registration of the Stock:

6. That the court erred in making the following findings of fact, on the ground that they are not justified by competent evidence or any evidence:

(a) Finding of fact numbered VII, in so far as it found that the defendant corporation was organized at the instance of The Chase National Bank and its officers and stockholders and for the purpose of enabling the bank to engage in stock operations, and to buy and sell its own capital stock.

(b) Finding of fact numbered XII, to the effect that defendant was engaged in the securities business in the state of Minnesota; and that defendant was selling said Chase units in the state of Minnesota.

(c) Finding of fact numbered XIII, in so far as it found that one Weir Jepson was an agent of defendant "duly authorized by it" to solicit and sell to plaintiff said stock in question.

[fol. 1186] (d) Finding of fact numbered XIV, in so far as it failed to find also the circumstances of termination of affiliation between the defendant and Chase National Bank in 1933-1934.

(e) Finding of fact numbered XVII, to the effect that defendant fraudulently and wilfully suppressed facts concerning the nature and formation of the bank and defendant; that it fraudulently and wilfully concealed and suppressed the fact that the said stock was not registered for sale in the state of Minnesota and was illegally sold therein; that its agent was not licensed to sell said stock in Minnesota.

(f) Finding of fact numbered XVIII, to the effect that plaintiff believed and relied upon implied representations (as to registration of said stock), made to her by defendant, in the purchase of said stock.

(g) Finding of fact numbered XX, in so far as it found that defendant wilfully and knowingly authorized and permitted one Weir Jepson to act as its agent in this state and to offer for sale and sell said stock to plaintiff and others in this state in the course of successive and repeated sales thereof in this state.

7. That the court erred in making the following findings of fact, on the ground that they are not justified by competent evidence or any evidence, and that they are contrary to law:

[fol. 1187] (a) Finding of fact numbered XV, to the effect that defendant impliedly represented to plaintiff that said stock in question was duly registered for sale under the laws of the state of Minnesota and that it had complied with the laws and statutes of the state of Minnesota and of the United States.

(b) Finding of fact numbered XIX (first two paragraphs thereof), to the effect that said stock was required by the laws of the state of Minnesota to be registered under the Blue Sky Law, and that said stock was not exempt therefrom; that defendant wilfully and fraudulently failed to register said stock under the Blue Sky Law; that the sale to plaintiff here involved was not an isolated sale and that said sale was made in the course of repeated and successive sales in Minnesota; that the reason that defendant did not register said stock for sale in this state was that it would have been compelled to reveal that it was engaged in claimed market manipulation activities.

(c) Finding of fact numbered XXI, to the effect that the sale of said stock to plaintiff was in violation of the provisions of the Minnesota Blue Sky Law and was illegal and void and incapable of ratification or confirmation as between the original parties to the sale.

[fol. 1188] C. As to Alleged Market Manipulations:

8. That the court erred in making the following findings of fact, on the ground that they are not justified by competent evidence or any evidence:

(a) Finding of fact numbered XVI, to the effect that defendant had represented to plaintiff that, in the sale of said stock, there was a free, uncontrolled and unmanipulated market for said stock, and that said plaintiff purchased said stock in a free, uncontrolled and unmanipulated market, and that the price at which plaintiff purchased said stock was determined by lawful and legitimate factors of supply and demand.

(b) Finding of fact numbered XVII, to the effect that defendant fraudulently and wilfully concealed and suppressed the fact that defendant, at the time of the sale to plaintiff, was engaged in illegal pool activities, and fraudulently and wilfully concealed the fact that the market for said stock was not a free, uncontrolled and unmanipulated market.

(c) Finding of fact numbered XVIII, to the effect that plaintiff believed and relied upon implied representations (as to a free, uncontrolled and unmanipulated market), made to her by defendant, in the purchase of said stock.

(d) Finding of fact numbered XIX (third paragraph [fol. 1189] thereof), to the effect that for a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market or said stock through pool operations, which defendant concealed; that defendant must have known that if it had attempted to register said stock with the Commissioner of Securities of Minnesota, it would have been compelled to disclose said market manipulations.

(e) Finding of fact numbered XXII, to the effect that at the time of the sale of the stock to plaintiff, defendant main-

tained and controlled an over-the-counter market for the purchase and sale of said stock, that said market was not free and open, that the prices were not fixed according to lawful factors of supply and demand and that the prices at which said stock was sold on the market were manipulated and controlled by defendant.

(f) Finding of fact numbered XXIII, to the effect that prior to January 12, 1928, the stock of the Chase National Bank was listed on the New York Stock Exchange and on said date was delisted at the request of the bank; that the stock of Chase Securities Corporation was never listed on the New York Stock Exchange; and that after January 12, 1928, said stock units were traded in exclusively on the over-the-counter market maintained by defendant.

(g) Finding of fact numbered XXIV, to the effect that for a considerable time prior and subsequent to the sale [fol. 1190] to plaintiff, defendant was engaged in a vigorous and extensive campaign for sale of said units to the public, for the purpose of creating a larger clientele to whom defendant could sell securities.

(h) Finding of fact numbered XXV, to the effect that Metpotan Securities Corporation was a New York corporation, whose stock was owned by defendant and whose officers were likewise officers of defendant.

(i) Finding of fact numbered XXVI, to the effect that on September 21, 1927, defendant through said Metpotan Securities Corporation, entered into a joint account or pool with other companies to buy and sell Chase units, which continued until April 28, 1928; that Metpotan was the pool manager and in direct charge of the pool; that Metpotan was financed by defendant; that during all of said period, defendant through Metpotan daily bought and sold large blocks of units; that the pool made a profit of some $50,620; that at the time the account was opened, Chase units had prices at 575 bid, 580 asked; that when the pool closed, the quotation was 684 bid and 690 asked.

(j) Finding of fact numbered XXVII, to the effect that on April 28, 1928, Metpotan entered into another pool or account with other companies, that, as in the earlier amount, defendant financed Metpotan in such pool, which made a profit of some $554,760 before it closed on April 9, 1929;

[fol. 1191] that the average price of Chase units to the pool and its members was $800 per unit, the price having risen from an "interim low" of $435 per unit.

(k) Finding of fact numbered XXVIII, to the effect that on April 10, 1929, defendant through Metpotan entered into another pool with other companies, which pool was managed or controlled by Metpotan; that defendant financed the pool; that until the account was closed on July 3, 1930, the pool had a profit of $321,250; and that the market price of said Chase units was $140 per unit.

(l) Finding of fact numbered XXIX, to the effect that on July 29, 1929, defendant caused to be formed another pool in Chase units which was managed by Dominick and Dominick, whereby the latter was given an option by defendant to purchase from defendant 80,000 Chase units at a scale of ascending prices, ranging from $210 per share for the first 20,000 shares, the next 10,000 shares for $220 per share, and each 10,000 shares thereafter at a price of $5 per share more than the price in the preceding group, up to a price of $240 per share for the last 10,000 shares (up to 80,000 shares); that at said time, the price of said units was below the lowest price specified in the option; that Dominick and Dominick had full control and right of management of the pool and participated in the profits; that there was a $2 per share penalty for each share re-purchased on the market by the pool at a price below that at which it was taken from the pool; that Dominick and Dominick exercised said [fol. 1192] option of defendant at a profit to sellers of over a million dollars; that said pool ran to November 11, 1929.

(m) Finding of fact numbered XXX, to the effect that during year 1928, defendant and its subsidiary Metpotan received profits from pool activities of Chase units of $726,846.01, and in 1929 received a profit of $1,801,769.99; that certain purchases and sales of Chase units were made by defendant and Metpotan as shown in said finding.

(n) Finding of fact numbered XXXI, to the effect that defendant and its subsidiary Metpotan engaged in pools and trading accounts for purchase and sale of Chase units during years 1928 and 1929; that defendant did not disclose to public or to plaintiff the existence of said pools or accounts; that defendant participated in said pools and ac-

counts through its subsidiary, Metpotan, which was defendant's instrumentality to avoid reference in its own surplus account to the profits of the pool; that at the same time, defendant was conducting a nation-wide campaign to sell Chase units; that plaintiff had no knowledge of these pools or accounts and the influence of them on the over-the-market price for said units; that defendant used these pools to create an appearance of great interest and activity in the market for Chase units to attract prospective purchasers and for the purpose of raising the price of said units; that defendant thereby was enabled to sell its Chase units at a profit, and plaintiff was induced to purchase said units upon [fol. 1193] such misleading appearance fraudulently created; that the price quoted plaintiff at the time of her purchase was not a true and genuine price arrived at by lawful factors of supply and demand in a free market.

9. That the court erred in receiving and considering, over the objection of defendant, properly made and ruling excepted to at the time of trial, hearsay and incompetent evidence in the form of a printed report by the Sub-committee of the Committee on Banking and Currency of the United States Senate of the 72nd Congress (Plaintiff's Exhibits A-56 and A-57) and relating to hearings conducted by said Sub-committee between the dates of October 17 and October 25, 1933, and between October 26 and November 10, 1933, which were the sole basis of the findings of fact numbered XVI, XVII, XVIII, XIX, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXVII, as shown by said findings and by the court's denying defendant's motions, made at the conclusion of the trial and upon motion for amended findings, to strike such incompetent evidence from the record.

10. That the court erred in receiving and considering, over the objection of defendant properly made and ruling excepted to at the time of trial, hearsay and incompetent evidence in the form of the testimony of one Henry Hargreaves in the record of the case of Segal v. Chase Securities Corporation (Plaintiff's Exhibit A-54½), and also the [fol. 1194] affidavit of one Henry Hargreaves out of the files of the case of Hillard H. Holm v. Chase Securities Corporation (Plaintiff's Exhibit A-54) which were the sole basis of the findings of fact numbered XVI, XVII, XVIII,

XIX, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXVII, as shown by said findings and by the court's denying defendant's motions, made at the conclusion of the trial and upon motion for amended findings, to strike such incompetent evidence from the record.

D. As to the Nature of Action and Discovery of Alleged Fraud:

11. That the court erred in making finding of fact numbered XXXII (first paragraph thereof) to the effect that plaintiff did not discover the falsity of defendant's statements and representation nor any other facts allegedly concealed, withheld or suppressed by defendant until on or about October 11, 1937, and within six years prior to the commencement of this action, upon the ground that it is not justified by competent evidence or any evidence.

12. That the court erred in making finding of fact numbered XXXII (second paragraph thereof), to the effect that "insofar as plaintiff's cause of action is founded on representations knowingly made by defendant * * *," plaintiff's action is one for "relief on the ground of fraud," under Section 9191 of Mason's Minnesota Statutes, 1927, [fol. 1195] and is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"; and that under this provision, plaintiff seasonably commenced her action within the time limited by the statute of limitations, upon the following grounds:

(a) That it is not justified by competent evidence or any evidence.

(b) That said finding is vague and indefinite and does not state unqualifiedly and precisely whether plaintiff's alleged cause of action is wholly or only partially determined to be within the said Section 9191 of the Statutes; that the qualified introductory phrase in said finding implies a doubt or uncertainty in the court's mind as to the extent of applicability of said statute; that the defendant is entitled to a square finding of fact or conclusion of law as to whether the court's decision is predicated upon this statute.

13. That the court erred in making finding of fact numbered XXXII (third paragraph thereof, to the effect that "insofar • • •" as said provisions "are applicable to plaintiff's cause of action," the provisions of Laws of Minnesota, 1941, Chapter 547, Section 18, extended the time to July 1, 1942, within which plaintiff could have commenced this action and that this action was duly commenced "within the time limited by the statutes of the state of Minnesota," upon the following grounds:

[fol. 1196] (a) That it is not justified by competent evidence or any evidence.

(b) That it is erroneous and contrary to law.

(c) That if said finding constitutes a determination by the court that the plaintiff's cause of action, previously barred by the general statute of limitations (Section 9191 of Mason's Minnesota Statutes, 1927), was revived by said 1941 law, then said 1941 law is unconstitutional, null and void, in that said statute deprives defendant of its property without due process of law, in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States and Section Seven of Article One of the Constitution of the State of Minnesota.

(d) That said finding is vague and indefinite and does not specifically and directly say that said 1941 law is applicable to plaintiff's alleged cause of action; that if said 1941 law is not applicable to the case, this finding is wholly irrelevant, immaterial and contrary to law; that the defendant is entitled to a square finding of fact or conclusion of law as to whether the court's decision is predicated upon this statute.

14. That the court erred in making the findings of fact in the second and third paragraphs of finding of fact numbered XXXII, to the effect that the action was seasonably commenced by plaintiff within both Section 9191 of Mason's Minnesota Statutes, 1927, and Laws of Minnesota, 1941, [fol. 1197] Chapter 547, Section 18, for the reason that a finding of fact as to the applicability of the one statute makes surplusage and irrelevant the finding of fact as to the applicability of the other statute.

E. As to Tender, Ratification and Estoppel:

15. That the court erred in making the following findings of fact, on the ground that they are not justified by competent evidence or any evidence and are contrary to law:

(a) Finding of fact numbered XXXIII, to the effect that promptly upon discovery of the illegality of the sale and on or about October 11, 1937, plaintiff formally repudiated the transaction, demanded a refund and return of her purchase price and interest which was rejected by defendant; that the tender was received at trial and refused by defendant; that each of said tenders was sufficient as a matter of law and that it would have been a vain and useless act for plaintiff to make further tenders to defendant.

(b) Finding of fact numbered XXXIV, insofar as it found that plaintiff received and accepted dividends upon the stock before her discovery of the alleged facts claimed to constitute fraud.

(c) Finding of fact numbered XXXVI, to the effect that plaintiff did not actively participate in the numerous changes in the capitalization of the Bank and of defendant, subsequent to the purchase of her stock from defendant; that [fol. 1198] such changes were within the contemplation of the parties at the time of the sale of the stock to plaintiff; that plaintiff's participation in said changes was incidental and indirect and that her receipt and acceptance of dividends and such participation do not estop plaintiff from asserting her claim here or constitute a waiver of such wrong doing.

F. As to Damages:

16. That the court erred in making finding of fact numbered XXXV, to the effect that plaintiff has been damaged by defendant and defendant is indebted to plaintiff in the sum of $1,828, with interest from and after August, 1939, less credit for dividends of $189.56, together with interest from dates of payment thereof.

G. As to Jurisdiction of Court Over Defendant:

17. That the court erred in denying, at the outset of the trial, the motion of defendant appearing specially, to quash service of process attempted upon defendant (as to which proper and timely motion was made by defendant at the

commencement of the action and as to which proper exception and reservation of exception were taken by defendant and allowed by the court) and renewing defendant's objections to the jurisdiction of the court over the person of defendant and the subject matter of the action.

[fol. 1199] 18. That the court erred in denying the said motions referred to in the paragraph next preceding, which were made and renewed by defendant at the conclusion of the trial.

19. That the court erred in denying the motion of defendant, to dismiss upon jurisdictional grounds, which said motion was made after the motion to quash service had been overruled at the conclusion of the trial.

H. As to Defendant's Motion to Strike Evidence (made at conclusion of trial—pages 466 to 475 of typewritten transcript):

20. That the court erred in denying by finding of fact numbered XXXVII the following motions of defendant, made at the conclusion of the trial, for all the reasons and upon all the grounds of objection urged at the time, and also at the time that the documents or testimony described were offered during the trial:

(a) The motion to strike the following exhibits of plaintiff identified and offered upon the examination of plaintiff's witness Charles L. Hayes, as follows:

Plaintiff's Exhibit A, identified and offered as the application for the broker's license in 1928 (offered at pages 18 to 20 of typewritten transcript).

Plaintiff's Exhibit C, identified and offered as the application for the 1929 broker's license (offered at page 21 of typewritten transcript).

[fol. 1200] Plaintiff's Exhibit E, identified and offered as the application for the 1930 broker's license (offered at page 22 of the typewritten transcript).

(b) The motion to strike Plaintiff's Exhibit G, identified and offered as a letter dated July 2, 1931, purportedly signed by H. Hargreaves, relating to a cancellation of broker's license (offered on page 23 of typewritten transcript).

(c) The motion to strike Plaintiff's Exhibit J, being the list of agent's licenses, including licenses issued after the transaction in suit (offered on pages 25 to 27 of typewritten transcript).

(d) The motion to strike Plaintiff's Exhibit K, identified as a letter dated June 29, 1929, purportedly signed by one Fitzgerald and addressed to the Commissioner of Securities (offered on page 31 of typewritten transcript).

(e) The motion to strike Plaintiff's Exhibit R-3, identified by the witness Helen Chapman, and described as the Chicago office security ticket (offered on pages 62 and 63 of typewritten transcript).

(f) The motion to strike the conversation between plaintiff and Weir Jepson relative to the purchase of eight shares of the stock here involved, commencing on page 84 and ending on page 88 of the typewritten transcript.

(g) The motion to strike the testimony of plaintiff, found on the bottom of page 87 and continuing to page 90 of the typewritten transcript, relating to the fact that if [fol. 1201] she knew or believed that the stock was not registered, she would not have purchased it.

(h) The motion to strike that portion of plaintiff's testimony on page 90 of the record where she was permitted, over objection of defendant, to state her reasons why she would not have purchased Chase stock if she knew it was not registered.

(i) The motion to strike that portion of plaintiff's testimony on page 91, where she was permitted to state, over objection of defendant, that she would not have purchased the stock if she had known that Mr. Jepson was not licensed in Minnesota and that the sale by him was legal.

(j) The motion to strike that portion of plaintiff's testimony given upon re-direct examination that she did not discover that the Chase stock was not registered until about October 11, 1937 (on pages 177 and 178 of typewritten transcript).

(k) The motion to strike that portion of plaintiff's testimony given upon re-direct examination to the effect that she did not discover that Mr. Jepson was not licensed in

Minnesota until about October 11, 1937 (on page 178 of typewritten transcript).

(l) The motion to strike that portion of plaintiff's testimony (on page 179 of typewritten transcript) that she had not heard that the Chase Securities Corporation was en-
[fol. 1202] gaged in pool operations and in manipulation of stock prior to October 11, 1937.

(m) The motion to strike the following plaintiff's exhibits, all having to do with the so-called pools:

Plaintiff's Exhibit A-25, identified as a photostatic copy of a letter dated September 21, 1927, purportedly addressed to Blair & Company, and signed by the Metpotan Securities Corporation (offered at pages 222 through 226 of typewritten transcript);

Plaintiff's Exhibit A-26, identified as a photostatic copy of a letter addressed to Potter & Company, dated April 18, 1928, purportedly signed by Metpotan Securities Corporation (offered at page 226 of the typewritten transcript);

Plaintiff's Exhibit A-27, identified as a letter dated April 10, 1929, addressed to Broomhall, Killough & Company, and purportedly signed by Metpotan Securities Corporation (offered at page 228 of typewritten transcript);

Plaintiff's Exhibit A-28, identified as a letter dated July 19, 1929, addressed to the Chase Securities Corporation, and purportedly signed by Dominick and Dominick (offered at pages 228 and 229 of typewritten transcript);

Plaintiff's Exhibit A-29, identified as a letter from Metpotan Securities Corporation to Blair & Company, dated April 26, 1927 (offered at pages 244 and 245 of typewritten transcript);

Plaintiff's Exhibit A-30, the first page of a letter pur-
[fol. 1203] portedly from Dominick and Dominick to Chase Securities Corporation in reference to the formation of a trading account, dated January 7, 1930 (offered on pages 245 and 246 of typewritten transcript);

Plaintiff's Exhibit A-31, identified as the second page of said letter (offered at pages 245 and 246 of typewritten transcript);

Plaintiff's Exhibit A-32, identified as a letter from the Chase Securities Corporation to the Metpotan Securities Corporation, dated January 9, 1930, stating that the trad-

ing account was entered into for Metpotan Securities Corporation (offered on page 246 of typewritten transcript);

Plaintiff's Exhibit A-33, identified as a letter from Dominick and Dominick to Chase Securities Corporation, dated July 19, 1929, and the accompanying letter (offered at pages 246 and 247 of typewritten transcript);

Plaintiff's Exhibit A-34, identified as a letter from the Chase Securities Corporation to the Metpotan Corporation, dated July 24, 1929, stating that it turned over its interests in the account to Metpotan (offered at pages 246 and 247 of typewritten transcript);

Plaintiff's Exhibit A-38, identified as stock certificate No. 1 of the Metpotan Securities Corporation for 125 shares issued to William H. Cooper (offered at page 253 of typewritten transcript);

Plaintiff's Exhibit A-39, identified as certificate No. 3 of the Metpotan Securities Corporation, issued in the name [fol. 1204] of Henry Hargreaves (offered at page 253 of typewritten transcript).

(n) The motion to strike the following plaintiff's exhibits, all offered to establish intentional violation of the Blue Sky Law by defendant:

Plaintiff's Exhibit A-42, identified as a statement of the capital stock increases, surplus, yearly profits, etc., offered for the purpose of showing an intentional violation of the Blue Sky Law of Minnesota (offered at pages 258 and 259 of typewritten transcript);

Plaintiff's Exhibit A-43, another statement offered for the same purpose (offered at pages 258 and 259 of the typewritten transcript);

Plaintiff's Exhibit A-44, identified as the annual report for the year 1928, dated January 8, 1929 (offered at page 261 of typewritten transcript);

Plaintiff's Exhibit A-49, identified as the annual report for the year 1927 and dated January 10, 1928 (offered at pages 264 and 265 of typewritten transcript);

Plaintiff's Exhibit A-50, identified as the annual report for 1929, dated January 14, 1930 (offered at page 264 of typewritten transcript).

(o) The motion to strike the following exhibits of plaintiff: A-52 and A-53, identified as certified copies of resolu-

tions of the board of directors of Chase Securities Corporation relative to the official position of Mr. Hargreaves (offered on page 267 of typewritten transcript).

(p) The motion to strike plaintiff's exhibit A-54, identi- [fol. 1205] fied as part of an affidavit purportedly made and signed by Henry Hargreaves, and filed in the case of Hillard Holmes v. Chase Securities Corporation (offered on pages 269 through 272 of typewritten record).

(q) The motion to strike each and every part and portion of the record offered from the transcript of the Segal case Plaintiff's Exhibit A-54½ (offered at pages 286 to 289 of typewritten transcript).

(r) The motion to strike Plaintiff's Exhibits A-55, A-56 and A-57, being the so-called Pecora reports and each and every part offered therefrom and each and all of the exhibits identified from the books and offered from said books (offered and read into the record, with intermittent objections of defendant from pages 290 to 453 of typewritten transcript).

I. As to Affirmative Defenses in Answer:

21. The court erred in ruling, by finding of fact numbered XXXVII, that the allegations of defendant's answer were not true and not sustained by the evidence, and in ruling as to certain affirmative defenses contained in the answer:

"(a) That the transaction giving rise to plaintiff's cause of action was made and consummated in Minnesota, and not outside the said state. (Findings of [fol. 1206] fact numbered XIII and XXI.)

"(b) That the Blue Sky Law of Minnesota applied to the transaction and rendered void the sale of the stock in question. (Finding of fact numbered XXI.)

"(c) That the shares of stocks in The Chase National Bank of the City of New York and Chase Securities Corporation were securities and were subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities not exempt therefrom. (Finding of fact numbered XXI.)

"(d) That plaintiff's cause of action accrued within six years before the commencement of this action and

is not barred by the statute of limitations. (Finding of fact numbered XXXII.)

"(e) That plaintiff was not barred from rescinding the sale of said stock and maintained this action on the grounds of laches, ratification and estoppel. (Finding of fact numbered XXXVI.)

"(f) That plaintiff was not barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structure of said Chase National Bank and defendant corporation which altered materially and substantially her interest in [fol. 1207] said corporations." (Finding of fact numbered XXXVI.)

on the ground that such finding of fact numbered XXXVII, in all the respects above stated, is not justified by the competent evidence and is contrary to law.

22. The court erred in failing to rule and determine, as to the affirmative defenses pleaded by defendant in its answer:

"(a) That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

"(b) That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

"(c) That the shares of stocks of The Chase National Bank of the City of New York and Chase Securities Corporation were securities not subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities exempt therefrom.

"(d) That the Minnesota Blue Sky Law, if applied to said transaction between plaintiff and defendant, would deprive defendant of its property without due [fol. 1208] process of law, in violation of the provisions of Section 7 of Article 1 of the Constitution of the State of Minnesota, and Section 1 of the Four-

teenth Amendment of the Constitution of the United States.

"(e) That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as being in contravention of Section 8, Article 1, of the Constitution of the United States of America which confers upon Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes.

"(f) That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as impairing the obligations of simultaneous transfer of the shares of stock of the said The Chase National Bank of the City of New York with shares of stock of the Chase Securities Corporation provided for in the Deposit Agreement entered into on about March 21, 1917, between the stockholders of the said Bank, a committee of stockholders, and the Bankers Trust Company of New York, and provided for in the Certificate of Incorporation of the Chase Securities Corporation; both of which, said contracts, became effective prior to June 21, 1917, and prior to the effective date of the first Blue Sky Law of Minnesota.

[fol. 1209] "(g) That plaintiff's cause for action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations.

"(h) That plaintiff either discovered or with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted commencement of this action and that the cause of action, if any, is barred by the statute of limitations.

"(i) That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action."

"(j) That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

"(k) That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structures of said Chase National Bank and defendant corporation [fol. 1210] which altered materially and substantially her interest in said corporations,"

on the ground that the competent evidence in the case and the applicable law justify said findings of fact and conclusions of law.

J: As to Conclusion of Law:

23. That the court erred in making conclusion of law numbered 1, wherein it is found that plaintiff is entitled to judgment against defendant for the sum of $1,828.00 and interest, less the sum of $189.56 in dividends received by plaintiff, and costs and disbursements of plaintiff, on the ground that said conclusion of law is not sustained by findings of fact based upon competent evidence and is contrary to law.

24. That the court erred in making conclusion of law numbered 2, wherein it was found that, upon satisfaction of said judgment by defendant, the plaintiff shall deliver to the clerk of court the shares of stock involved in said action, and dividends received, to be delivered to defendant by the said clerk, on the ground that said conclusion of law is not sustained by findings of fact based upon competent evidence and is contrary to law.

Said motion for a new trial is made upon the transcript of the testimony and the settled case and all the files, records and proceedings herein, and is based upon all the grounds above specifically set forth and upon the following additional grounds:

[fol. 1211] 1. That there is no competent evidence or any evidence in the case to support the findings of fact and conclusions of law or portions thereof, specified above, and that the court erred in making them.

2. That each and every part of said findings of fact and conclusions of law, specified above, is contrary to law and that the court erred in making them.

3. That the only cause of action, if any, established by the evidence is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the statute of limitations.

4. That the matter contained in the court's present findings of fact, conclusions of law and order for judgment, heretofore specifically referred to, which are inconsistent with and irrelevant to an action based on violation of statute, should be stricken.

5. That Section 8 of Chapter 547, Laws of Minnesota, 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat., 1927.

6. That there is no evidence to justify the court in finding that plaintiff had established a cause of action for relief on the ground of fraud, and Section 9191, [fol. 1212] subdivision 6, Mason's Minn. Stat., 1927, has no application to the case.

7. That the matter offered from the so-called Pecora Report and Segal Record is hearsay and incompetent matter and without proper foundation for introduction into evidence, and defendant's motions to strike said matter and all matter offered in connection with and related thereto should have been granted; that findings of fact and conclusions of law based upon such matter are erroneous and contrary to law.

8. That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

9. That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

10. That the shares of stocks of The Chase National Bank of the City of New York and Chase Securities Corporation were securities not subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities exempt therefrom.

11. That the Minnesota Blue Sky Law, if applied to [fol. 1213] said transaction between plaintiff and defendant, would deprive defendant of its property without due process of law, in violation of the provisions of Section 7 of Article 1 of the Constitution of the State of Minnesota, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

12. That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as being in contravention of Section 8, Article 1, of the Constitution of the United States of America, which confers upon Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes.

13. That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction, as impairing the obligations of simultaneous transfer of the shares of stock of the said The Chase National Bank of the City of New York with shares of stock of the Chase Securities Corporation provided for in the Deposit Agreement entered into on about March 21, 1917, between the stockholders of the said Bank, a committee of stockholders, and the Bankers Trust Company of New York, and provided for in the Certificate of Incorporation of the Chase Securities Corporation; both of which, said contracts, became effective prior to June 21, 1917, and prior to the effective [fol. 1214] date of the first Blue Sky Law of Minnesota.

14. That plaintiff's cause of action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations.

15. That plaintiff either discovered or with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted com-

mencement of this action and that the cause of action, if any, is barred by the statute of limitations.

16. That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action.

17. That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

18. That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to funda- [fol. 1215] mental changes in the corporate structures of said Chase National Bank and defendant corporation which altered materially and substantially his interest in said corporations."

Dated September 8, 1942.

Stinchfield, Mackall, Crounse & Moore, Attorneys for Defendant, 1100 First National-Soo Line Building, Minneapolis, Minnesota.

IN DISTRICT COURT OF HENNEPIN COUNTY

NOTICE OF ENTRY OF ORDER

To defendant above named, and Messrs. Stinchfield, Mackall, Crounse & Moore, its attorneys:

You will please take notice, that, on the 18th day of November, 1942, the above honorable court made and entered, and on the 19th day of November, 1942, filed with [fol. 1217] the clerk of the above court, its order, a copy whereof is hereto attached.

Dated November 20, 1942.

Leonard, Street & Deinard and T. O. Streissguth, Attorneys for Plaintiff, 1036 Andrus Building, Minneapolis, Minnesota.

IN DISTRICT COURT OF HENNEPIN COUNTY

ORDER DENYING MOTIONS OF DEFENDANT

The above entitled matter came on for hearing before the undersigned, one of the judges of the above named court, at chambers, upon a motion on the part of defendant for conclusions of law and order for judgment made and entered on June 27, 1942, and to enter judgment in accordance with the proposed amended findings of fact and conclusions of law, or in the event of that motion being denied, then for an order of this court amending the findings of fact and conclusions of law and granting to defendant a new trial, all on the grounds and for the reason set forth in said notice of motion; S. E. Nelson, Esq., and Frederick H. Stinchfield, Esq., of the firm of Messrs. Stinchfield, Mackall, Crounse & Moore, appearing for defendant in support of said motion, and T. O. Streissguth, Esq., and H. Edelman, of the firm of Messrs. Leonard, Street & Deinard, appearing for plaintiff in opposition thereto. The court being [fol. 1218] fully advised in the premises, after listening to the argument of counsel for the respective parties, reading the briefs presented, and upon all the records, files and proceedings had, it is

Ordered that said motions and each of them be and the same are in all things denied.

Dated November 18, 1942.

By the Court, W. W. Bardwell, District Judge.

IN DISTRICT COURT OF HENNEPIN COUNTY

JUDGMENT AND DECREE—November 25, 1942

The above entitled action having been regularly placed upon the calendar of the above named court for the September, A. D. 1938, General Term thereof, came on for trial before the court on the 9th day of May, A. D. 1942; and the court, after hearing the evidence adduced at said trial and being fully advised in the premises, did on the 27th day of June, A. D. 1942, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of Messrs. T. O. Streissguth and Leonard, Street & Deinard, attorneys for plaintiff, it is hereby adjudged and decreed:

1. That plaintiff have and recover of defendant the sum of Two Thousand Nine Hundred Eighty-four and 67/100 [fols. 1219-1223] Dollars, the amount ordered with interest to date hereof, less dividends, together with the sum of Thirty-three and 45/100 Dollars, costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of Three Thousand Eighteen and 12/100 Dollars ($3,018.12).

2. That, upon satisfaction by defendant of said judgment, plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, certificate No. 170 762 for 9 shares of common stock in Chase National Bank of the City of New York, and certificate No. 067 711 for 1 share of common stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificate shall, upon execution of proper receipt therefor, be delivered to defendant; and plaintiff shall, in addition, deliver or pay to said clerk for delivery and payment to defendant, all dividends received by her on said stock since June 10, 1939, with interest at the rate of six per cent per annum from the date of the receipt thereof by plaintiff.

By the Court: Geo. H. Hemperley, Clerk of District Court. By A. A. Carlson, Deputy.

[fols. 1224-1756] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

32669

DONALD L. POMEROY, Respondent,

vs.

THE NATIONAL CITY COMPANY, ETC., Appellant

Stone, J., Gallagher, C. J., Holt, J., Peterson, J., Dissenting

SYLLABUS

1. General statutes of limitation, although making no mention of foreign corporations, apply thereto notwithstanding.

2. If a case is fairly within the purpose of a statute, it must go to decision thereunder, unless excluded by necessary implication or explicit terms.

3. Capricious distinctions are not to be imputed to the legislature. Unjust and indefensible results of a statute are to be avoided by construction, if possible.

4. A foreign corporation which has ceased doing business in the state and withdrawn therefrom except that, in obedience to statute, it has left here a continuing agent for personal service of process in actions arising from its Minnesota business, is, in contemplation and as result of law, continuously present here for service upon it in such actions. Hence, the running of the statute of limitations is not tolled by its qualified departure from the state.

Reversed.

OPINION—Filed January 10, 1941

STONE, Justice:

Defendant appeals from an order sustaining a demurrer to its plea of the statute of limitations.

From April, 1917, to August, 1934, defendant was in this state as a foreign corporation, qualified under applicable statutes. In August, 1934, defendant ceased to transact [fol. 1757] business in Minnesota and formally withdrew therefrom, except that, in compliance with the statutes (1

Mason Minn. St. 1927, § 3996-11 and 2 Mason Minn. St. 1927, § 7494), it had irrevocably appointed both Commissioner of Securities and Secretary of State its agents for service of process in actions arising from its Minnesota business.

It is enough of the facts that plaintiff must be considered to have sued "upon a liability created by statute" arising from defendant's business in Minnesota. Under Mason Minn. St. 1927, § 9191, the action is barred, not having been commenced within six years from the time the cause of action accrued, in April, 1929 (when defendant was doing business here), unless saved by the tolling provisions of Mason Minn. St. 1927, § 9200, which declare that:

> "If, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the times herein limited after his return to the state; and if, after a cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action."

In respect to the appointment of the Commissioner of Securities, the statute declares that service upon him "shall be as valid and binding as if due and personal service had been made." Defendant's appointment of the Secretary of State was made under Mason Minn. St. 1927, § 7494 (since superseded by Mason Minn. St. 1940 Supp. §§ 7495-13, 7495-16). "Such appointment," it is declared, "shall continue in force as long as any cause of action, right, or claim against said corporation survives in this state; and service upon such agent shall be deemed personal service upon the foreign corporation so appointing him."

If, within the meaning of the tolling statute, defendant departed therefrom in 1934 and has since resided out of the state, the statute of limitations was tolled and the demurrer properly sustained. This presents the one question for decision.

1. Such limitation statutes, although making no mention of foreign corporations, apply thereto, notwithstanding. City of St. Paul v. Chicago, Milwaukee & St. Paul Ry. Co. 45 Minn. 387, 48 N. W. 17; Annotation, 59 A. L. R. 1336. [fol. 1757a] Statutes abound with use of the word "person" to include corporations. See Index, 2 Mason Minn. St.

1927, "Person". The legislature has enjoined that "unless another intention clearly appears * * * the word 'person' [in statutes] may extend and be applied to bodies politic and corporate." 2 Mason Minn. St. 1927, § 10933.

2. It is idle to suggest that in the enactment long ago of our general statute of limitations the legislature anticipated actions against foreign corporations withdrawn from the state, leaving behind a continuing agency for service of process. So we have a problem thus dealt with in Gray, The Nature and Sources of the Law (2 ed.), p. 173:

> "The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

We cannot agree that, in the process of decision, judges "guess" concerning such a problem or any other. Nothing is more essential in that process than for the judge to watch constantly the line between reasonable inference or logical deduction on the one hand and guess or conjecture on the other. The former constitutes the only sound material for decision.

We would be guilty of judicial legislation if we did not apply § 9200 to all cases not excluded by its terms and fairly within both its reason and purpose.

Statutes normally have their policy, their purpose, their reason for being. Legislators, no more than judges, have the faculty of comprehensive and unerring prevision. But, unlike judges, their function is to make rules for future conduct. The application of such rules to all cases not excluded by their terms and within their purpose and reason for being is a primary duty of judges.

That duty is not to be shirked simply because it is clear that the legislators did not foresee all cases to which their rule might apply. If a case is fairly within the purpose of a statute, it must go to decision thereunder, unless excluded [fol. 1758] by necessary implication or explicit terms, as by stated exception.

3. As to § 9200, this is a case unforeseen by its framers. But its purpose is not thereby to be defeated as to any case fairly within it. The object is repose, to be achieved by arbitrary limitation of time barring resurrection of stale claims. To the extent that judicial construction sets up a category of cases against which that bar cannot run, notwithstanding the complete amenability of the debtor to personal service, there is created an exception from the rule of the statute which by so much annuls its policy and defeats its purpose.

Such capricious distinctions are not to be imputed to the legislature. Unjust and indefensible results of a statute are to be avoided by construction, if possible. Dunnell, Minn. Dig. (2 ed. and Supps.), § 8943.

4. Generally, a corporation is present wherever it is doing business. While its domicile (particularly in respect to federal jurisdiction) is and always remains in its "home state", it may also be continuously present in others because of the presence and activities of its agents therein. For all purposes except the exercise of local jurisdiction, a corporation may be absent from the state of its incorporation in the sense that it has no business there, no office and no agent except one for service of process.

Such presence or any presence of a corporation is not fictional. It is the result of law. It exists only in contemplation of law. It is nevertheless real and a fact to be so regarded for all purposes of law. In re Trust Under Will of Clarke, 204 Minn. 574, 284 N. W. 876.

The domestic corporation doing no business in Minnesota, having no office here save one for service of process, is continuously present for purpose of being served. That being so, and for no other reason the statute of limitations continues to run in its favor. Why not also as to a foreign corporation which has ceased business here, closing all its offices, dismissing all its agents and withdrawing except for a statutory agent required by law for personal service? [fol. 1759] That status is real and adequate residual presence for purposes of suit. The utmost of disagreement must admit that it is at least a complete and satisfactory substitute for the presence required by the tolling statute.

A corporation is not absent from a jurisdiction where *personal* service upon it is continuously inescapable. Reason cannot conclude otherwise, unless it fails to distinguish

between the qualities which make up the personality of a natural person and those which characterize that of a corporation. There is a quality of ubiquity inherent in corporate personality impossible to that of a natural person. It enables a corporation to be continuously present simultaneously in many jurisdictions.

A corporation is present anywhere only by agents. Such presence is a result attached by law to stated corporate action. It is nevertheless fact. Being the creature of law, the law may limit and qualify it. So it may be for the one purpose of serving process. For such purpose, the presence is real and sufficient. While it continues and for accomplishment of the law's purpose, the corporation cannot be considered absent.

The declaration of § 7494 that the service "shall be deemed personal" is equivalent to saying that for service of process the corporation remains personally present. Meaning and effect would not be more plain had the statute declared that the departing corporation, leaving here its authorized agent, was to be considered present for actions arising from its Minnesota business. Being present for that purpose, it is presently irrelevant that it is absent for all others.

The requirement of § 7494, of the appointment of the agent for service of process, reaches every cause of action which "survives in this state". What must the cause of action survive in order to be within the statute?

The idea so expressed or implied must be given effect if possible. The survival of causes of action is a subject long [fol. 1760] covered by another statute, 2 Mason Minn. St. 1927, § 9656. Without more, and even though § 7494 were silent on the question, a foreign corporation is liable in all actions against it which survive under § 9656. Hence, if the reference in § 7494 to claims which survive "in this state" has no other effect than that of § 9656, the clause is meaningless.

Inasmuch as the foreign corporation is liable in any event on a cause of action continuing under the survivorship statute (§ 9656) and not barred by limitation, the thought suggests itself that the reference in § 7494, to a cause of action which "survives" has another or additional meaning. That meaning seems to us simply that the corporation will be liable upon all causes of action arising out of its Minnesota

business which, *at the time suit is commenced*, continue in spite of or survive *everything* which could deprive them of life or enforceability. A cause of action barred by the statute of limitations does not so survive. Only by holding that the clause which "survives in this state" was intended to reach every claim upon which an action can be maintained, and so exclude those barred by limitation, can we give it any meaning. Even so, it does not have much. At most, it appears to have been used in abundant caution, to make sure that the agency would continue as long as any claim arising from the principal's Minnesota business continued enforceable.

We have considered all authorities cited, with additions. At the outset, we have the long-settled policy of this court not to deny statutes of limitation their intended result of repose. Their purpose "in allowing specified times for commencing actions, and in making exceptions to the running of such times, is a practical one. It is to give to plaintiff what the legislature deemed a reasonable opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in any way a full and complete remedy, for the times specified, can have been intended" by the tolling statute. City of St. Paul v. C. M. & St. P. Ry. Co. 45 Minn. 387, 399, 48 N. W. 17.

[fol. 1761] That thought was repeated and made the basis of decision in Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162 (followed in Pattridge v. Palmer, 291 Minn. 387, 277 N. W. 18), where it was said, at page 360: "All statutes of limitation, in prescribing the periods, have reference for the beginning of such periods to the time when the opportunity to commence the action arises." That idea runs through much of the decision law (e. g. Penley v. Waterhouse, 1 Iowa, 498) relating to the statute of limitations and the tolling thereof. It was applied to a foreign corporation in decisive fashion in Walker v. L. E. Meyers Construction Co. 175 Okla. 548, 53 P. (2d) 547. The court said:

> "For a foreign corporation then to be a non-resident of the state or out of the state in the sense of the statute, it must be out of the state in such sense as to render it impracticable at all times to obtain service of process upon it."

In accord is Title Guaranty & Surety Co. v. McAllister, 130 Ohio St. 537, 200 N. E. 831, where it was considered "a

fair proposition" that "the test of the running of the statute should be the liability of the party invoking its bar to the service of process during the whole of the period prescribed." For this case, we repeat, under our statute the presence of the corporation for service of process is a fact. The law makes it so by saying that service upon the local agent shall be personal service. If that be not so, then at least there is a complete and satisfactory statutory substitute for the presence which respondent insists is necessary in order that the statute be not tolled. That was precisely the unanimous thought of this court expressed by Mr. Chief Justice Brown, in American Loan & Inv. Co. v. Boraas, 156 Minn. 431, 195 N. W. 271. There, the plaintiff, a foreign corporation, had done all that it could to withdraw from Minnesota. However, under our statutes it was still amenable to suit here and was sued on a cause of action arising out of its Minnesota business. Consequently, and notwithstanding the otherwise efficacious steps taken to withdraw, "the corporation, as to all unadjusted transactions theretofore entered into with citizens of the [fol. 1762] state, remained in this state, in contemplation of law, subject to the jurisdiction of its courts by the service of process."

Our decision is opposed to that in City Co. of New York v. Stern, 110 F. (2d) 601. No one feels greater deference to, or has higher regard for, a decision of the eighth Circuit Court of Appeals than the bench and bar of Minnesota. However, in a matter of state law, we would be shirking the responsibility which is ours if, where we differed with that eminent tribunal, we did not decide accordingly, with full statement of our reasons for doing so.

Aside from the decisions of this court soon to be considered, the decision in the Stern case was put upon the proposition, the gist of which is thus stated:

> "Nor can the defendant be said to reside and be present in Minnesota merely by reason of the fact that it remains subject to the jurisdiction of her courts in certain classes of actions. In this instance the right of the state to acquire jurisdiction in personam over the departed corporation in a limited class of actions does not rest on the basis of a fiction of continued presence in Minnesota but upon the defendant's express consent to accept service through designated attorneys."

We cannot agree that, under our statutes concerning departed foreign corporations, the local acquisition of jurisdiction in personam over them rests upon a mere "fiction" of continued presence, or that it arises, without more, from the consent of the defendant "to accept service through designated attorneys." The consent is present but only as a process. The result is a distinct status of presence in Minnesota. That the agent for service has no authority otherwise to represent his principal is unimportant. He has all the authority needed for personal service. Hence, his corporate principal is present with him for personal service.

The decision in the Stern case was put in part upon Venable v. Paulding, 19 Minn. 488, Gil. 422. The thought was that by that decision this court had adopted a literal application of the tolling statute. The entire discussion in the Venable case related to a defendant who was a natural person. He had been long absent from the state. A verdict had been directed in his favor. There was reversal solely [fol. 1763] because it was considered that there was a jury question whether, during all his absence, his residence continued in Minnesota so that there could have been the substituted personal service authorized by our statute (2 Mason Minn. St. 1927, § 9228), of which more later.

In the Stern case, Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, was considered "squarely in point on the construction of the tolling statute." There, the defendant's absence "was permanent in its nature" resulting from "a permanent change of residence." Concerning service upon him, the opinion states "the fact that Conant [assignee of the mortgage] might, notwithstanding the non-residence of the mortgagor [Benton], have resorted to substituted service of the summons, would not take the case out of the statutory exception [of departure from and residence out of the state]. The right to foreclose by action, therefore, still existed when the Conants entered into possession."

At this point, we should bring in a long-existing fact of our procedure. If the defendant is a natural person "residing or being within the state" service of summons may be made by delivering a copy "to the defendant personally." § 9228. But the service shall be deemed personal "if the copy * * * be left at the house of the usual abode of the

person to be served, with some person of suitable age and discretion then residing therein."

Beginning possibly after 1888, when Rogers v. Benton was decided, leaving a copy of the summons with a person of suitable age and discretion at a defendant's usual abode, has been considered, as matter of terminology, "substituted service." In Rogers v. Benton, the phrase could not have had that meaning because there what we now characterize as "substituted service" was impossible. He had no residence, that is, no place of usual abode, in this state, because, as the opinion stated, the defendant had "resided in Connecticut" during the whole of the determinative period. So, when the court, in Rogers v. Benton, mentioned "sub-[fol. 1764] stituted service of the summons" upon Benton, the reference was exclusively to publication of the summons. We no longer call that substituted service. It is constructive, not personal, service, and irrelevant when considering acquisition of jurisdiction in personam. It seems to us that Rogers v. Benton was inadvertently misconstrued in the Stern case.

In that case, there was a dissent by Judge Woodrough. He considered that, because of continuing amenability of the defendant to personal service in this state, the statute had not been tolled. With that view, we agree. Only by blinding ourselves to the stubborn and decisive fact that defendant has been present actually and continuously for purposes of personal service of process; only by saying that, notwithstanding, it has been wholly absent from the state, could we do otherwise than hold as we do.

The cases deciding the similar issue which has arisen under statutes for service of process upon non-resident owners of automobiles have not been ignored. Of these cases, Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A. L. R. 480, and Maguire v. Yellow Taxicab Corp., 253 App. Div. 249, 1 N. Y. S. (2d) 749, affirmed 278 N. Y. 576, 16 N. E. (2d) 110, are in disagreement with the thesis of this decision. In accord with it are Coombs v. Darling, 116 Conn. 643, 166 Atl. 70; Nelson v. Richardson, 295 Ill. App. 504, 15 N. E. (2d) 17; Arrowood, Admrx. v. McMinn County, 173 Tenn. 562, 121 S. W. (2d) 566.

The order under review is reversed.

Stone, J.

DISSENTING OPINION

HOLT, Justice, dissenting:

I dissent. In my judgment the majority opinion in City Co. of New York, Inc. v. Stern (8 Cir.) 110 F. (2d) 601, gives more satisfactory reasons for holding that the statute of limitation is tolled when a foreign corporation pursuant [fol. 1765] to § 7494, Mason Minn. St. 1927, withdraws from this state, than does the erudite opinion of Mr. Justice Stone that such removal does not toll the statute. There is no need to add to what is said by the prevailing opinion in the Stern case.

Holt, Justice.

GALLAGHER, Chief Justice, dissenting:

I agree with Mr. Justice Holt.

Gallagher, C. J.

PETERSON, Justice, dissenting:

I agree with Mr. Justice Holt.

Peterson, J.

[fol. 1766] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

Stone, J. Gallagher, C. J., Holt, J., Peterson, J., Dissenting

32572-32625

RUTH CHASE DONALDSON, Respondent,

vs.

CHASE SECURITIES CORPORATION, now Known as Amerex Holding Corp., Appellant

OPINION—Filed January 10, 1941

STONE, Justice:

Our decision in a companion case, Donald L. Pomeroy v. The National City Co., 209 Minn. —, — N. W. — (No. 32669) filed herewith, is decisive of the only question presented by this appeal and requires reversal of the order under review. This record indicates the presence of issues other than

that of the tolling of the statute of limitations. If, in respect to such issues, there are further proceedings below, this decision is without prejudice to them or to the result.

Reversed.

Stone, J.

GALLAGHER, Chief Justice, HOLT, Justice, and PETERSON, Justice, dissenting:

We dissent.

[fol. 1767] IN SUPREME COURT OF MINNESOTA

32572 and 32625

RUTH CHASE DONALDSON, Respondent,

vs.

CHASE SECURITIES CORPORATION, a Corporation Now Known as Amerex Holding Corporation, Appellant

JUDGMENT—March 7, 1941

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the orders and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent herein the sum and amount of Three Hundred and Eighty-nine and 70/100 Dollars, ($389.70) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 7, 1941.

By the Court.

Attest: Grace Kaercher Davis, Clerk.

[fol. 1767a] [File endorsement omitted.]

[fol. 1768] IN SUPREME COURT OF MINNESOTA

SPECIFIC ASSIGNMENTS OF ERROR—Filed March 31, 1943

Defendant assigns as error:

A. General:

1. That the judgment of the trial court (a) is not sustained by the evidence; and (b) is erroneous and contrary to law.

2. That the conclusions of law of the trial court (a) are not sustained by the evidence; and (b) are erroneous and contrary to law, and based upon erroneous findings of fact.

3. That the findings of fact (a) are not sustained by the evidence; and (b) are erroneous and contrary to law.

4. That the trial court erred in denying defendant's alternative motions for amended findings of fact, conclusions of law and order for judgment or for a new trial.

B. As to the Issue of Non-Registration of the Stock:

5. The trial court erred in making *Finding of Fact numbered VII* (R. 1137), as follows:

[fol. 1769] "VII

"Defendant was organized and its stock inextricably bound up with the stock of the Bank, as has been described, at the instance of the Bank, its officers and shareholders acting as such, for the purpose of enabling the Bank and its stockholders to engage in business and stock operations, and to buy, hold, or sell its own capital stock."

and in denying defendant's alternative motions to strike (R. 1165) the whole of said finding and to substitute in lieu thereof the following:

"VII

"Defendant was organized and its stock inextricably bound up with the stock of the Bank, as has been described, at the instance of the shareholders of the Bank, for the purpose of enabling such shareholders to profit

by defendant's engaging in the securities business in which the Bank itself could not engage."

or for a new trial upon said error (R. 1185, f. 3554).

6. The trial court erred in making *Finding of Fact numbered XII* (R. 1139-1140), as follows:

"XII

"From March, 1928, until July, 1931, defendant maintained offices within the State of Minnesota, fully staffed and equipped with furniture, supplies, and wire system, and was actually and continuously present and resident in the State of Minnesota, and doing business therein, and was engaged in the securities business therein, including the sale of stocks, shares, bonds, debentures and other securities directly and through its [fol. 1770] agents, in the course of continued and successive sales, and in the business of purchasing and acquiring directly and through its agents, securities for the purpose of reselling the same to others, and generally of buying, selling, otherwise dealing or trading in, promoting, negotiating, advertising and distributing such securities, under said broker's license, and defendant's agents were representing it in the State of Minnesota, and were engaged therein on its behalf in the selling, offering for sale and solicitation of the sale of securities.

"As a part of its said business in the State of Minnesota, defendant was, during the entire year 1929, and for some time thereafter, engaged in the sale and disposition for value, offering for sale, and solicitation of the sale of Chase units, then in the form of Bankers Trust Company receipts."

and in denying defendant's alternative motions to strike (R. 1166-1167) the whole of said finding and to substitute in lieu thereof the following:

"XII

"During the period while defendant was licensed as aforementioned in Minnesota, it engaged in the business of buying and selling securities, including the Chase units, to residents of the State of Minnesota,

among others. It maintained three offices in Minnesota, located in St. Paul, Duluth and Minneapolis, staffed with salesmen duly licensed under the Blue Sky Law of Minnesota and equipped with office furniture and equipment. The offices in Minnesota were under the control of and subordinate to an office of defendant in Chicago, Illinois. The sale of Chase units was customarily handled in the following manner: a salesman [fol. 1771] working out of one of the Minnesota offices would receive an order from a customer in this state; the order would be transmitted by telephone, telegraph or mail to the Chicago office; the Chicago office would then wire the order to the New York office of defendant which in turn would advise the Chicago office when, and the price at which, the order had been filled; the Chicago office would then send a confirmation in writing to the customer; in a majority of cases payment would be made by a remittance of the customer directly to the Chicago office, but the local Minnesota office in many instances accepted payment from customers and remitted the same to the Chicago office; the security was mailed by the Chicago office direct to the customer or to the Minneapolis office for delivery by it to the customer; in some cases, as in that at bar, the security would be sent to the customer's local bank with draft attached and the local bank would remit to defendant for the customer."

or for a new trial upon said error (R. 1185, f. 3555).

7. The trial court erred in making the first paragraph of *Finding of Fact numbered XIII* (R. 1140-1141), as follows:

"XIII.

"On or about August 8, 1929, at Minneapolis, Minnesota, defendant through one Weir Jepson, its agent duly authorized by it, solicited plaintiff to purchase and offered to and did sell to plaintiff eight Chase units, at a single indivisible purchase price of $1,828.00, which plaintiff paid to defendant at Minneapolis on August 23, 1929, Bankers Trust Company's receipt dated on or about September 9, 1929 (which was re- [fol. 1772] ceived in evidence as Plaintiff's Exhibit L),

evidencing said eight Chase units was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about September 10, 1929."

and in denying defendant's alternative motions to strike (R. 1167) the whole of said paragraph and to substitute in lieu thereof the following:

"On or about August 9, 1929, one Weir Jepson, a salesman of defendant licensed as an agent of defendant in the State of Iowa, without the knowledge or consent of defendant, solicited plaintiff in Minneapolis, Minnesota, and offered to sell to plaintiff eight Chase units, at a single indivisible purchase price of $1,828.00; that plaintiff placed an order for said Chase units at that price with said Weir Jepson; that through connivance with one Owen C. Devine, then the manager of the Minneapolis office of defendant, said order was entered in the records of defendant as having been solicited by said Owen C. Devine rather than said Weir Jepson; that said order was mailed by the Minneapolis office to the Chicago office of defendant bearing the name of Owen C. Devine as salesman; that several days later plaintiff received through the mail from defendant's Chicago office a written confirmation of the order; that thereafter and on or about August 23, 1929, defendant's Chicago office mailed Bankers Trust Company's receipt for said Chase units to First National Bank of Minneapolis, Minnesota, for delivery to plaintiff upon payment of said purchase price; that plaintiff paid said First National Bank of Minneapolis said purchase price and received said receipt from said bank, and said bank remitted the payment to defend- [fol. 1773] ant's Chicago office; that the Minneapolis office of defendant participated in the transaction only in the taking of the order for said security and the transmitting of it by mail to its Chicago office and that the remaining steps in said transaction and the sale itself were consummated by mail between plaintiff and defendant's Chicago office and was outside of the State of Minnesota and in interstate commerce; that neither defendant's Chicago nor New York offices, to which its Minneapolis office was responsible, ever

knowingly sanctioned or ratified the solicitation of said order by said Weir Jepson and in fact had no knowledge of his participation in said transaction."

or for a new trial upon said error (R. 1185, f. 3555). And in denying defendant's alternative motion (R. 1168-1169, ff. 3504-3505) that there be stricken from the first paragraph of said finding the words, "duly authorized by it," appearing in the first sentence of said finding.

8. The trial court erred in making *Finding of Fact numbered XIV* (R. 1141-1142), as follows:

"XIV

"On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Company receipt, a duplex certificate for nine units, No. F 52498 which was offered and received in evidence as Plaintiff's Exhibit N.

"On August 12, 1936, defendant issued to plaintiff, in exchange for said duplex certificate, two certificates, one for nine shares of Bank stock, being Certificate No. 170 762, which was offered and received in evidence as Plaintiff's Exhibit P, the other a scrip certifi- [fol. 1774] cate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to defendant of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by Certificate No. 067 711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O."

and in denying defendant's alternative motions to strike (R. 1169) the whole of said finding and to substitute in lieu thereof the following:

"XIV

"On November 6, 1930, the Bank issued to plaintiff, in exchange for her Bankers Trust Company receipt, a duplex certificate for nine units No. F 52498, which was offered and received in evidence as Plaintiff's Exhibit N.

"On August 12, 1936, the Bank issued to plaintiff, in exchange for said duplex certificate, one certificate for nine shares of Bank stock being Certificate No. 170 762, which was offered and received in evidence as Plaintiff's Exhibit P. At the same time plaintiff was entitled to a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to the Bank of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by Certificate No. 067 711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

"The exchange of the duplex certificate for separate shares in the bank and defendant was occasioned by the termination of the affiliation between the Bank and defendant as follows: On May 17, 1933, the Certificate of Incorporation of defendant was amended to [fol. 1775] provide that thereafter the defendant should not, either directly or indirectly, engage in the business of publicly buying, or selling securities; the par value of defendant's shares was reduced from $5.00 to $1.00 per share, and the capital of defendant was reduced from $37,000,000 to $7,400,000; and the name of the corporation changed from 'Chase Securities Corporation' to 'The Chase Corporation.' On June 15, 1934, the Certificate of Incorporation of defendant, then known as The Chase Corporation, was amended to eliminate the provision requiring its shareholders to be shareholdres of the Bank and forbidding transfer of shares in one corporation without joint and simultaneous transfer of shares in the other corporation, and the deposit agreement of March 21, 1917, was terminated. At about the same time, the par value of each share of defendant was increased from $1.00 to $10.00 and the number of outstanding shares was reduced from 7,400,000 to 740,000, and the name of defendant was changed from 'The Chase Corporation' to 'Amerex Holding Corporation.'"

9. The trial court erred in making *Finding of Fact numbered XV* (R. 1142), as follows:

"XV

"In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of *Mason's Minnesota Statutes, 1927*, Chapter 21-b; that the solicitation, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws and statutes of the State of Minnesota and the United States of America, and con- [fol. 1776] stituted a legal and valid solicitation, offer and sale of said Chase units; that said Chase units were in all respects valid, legal and genuine; that it and its agents were duly licensed to solicit, offer for sale and sell said Chase units in the State of Minnesota."

and in denying defendant's alternative motion to strike (R. 1170-1171) the whole of said findings, or for a new trial upon said error (R. 1187, f. 3559).

10. The trial court erred in making *Finding of Fact numbered XVII* (relating to non-registration of the stock) (R. 1143), as follows:

"XVII

"In selling said Chase units to plaintiff, defendant fraudulently and wilfully suppressed the facts concerning the nature and formation of said Bank and its affiliate, Chase Securities Corporation, and fraudulently and wilfully concealed and suppressed the fact that said Chase units were not registered for sale within the State of Minnesota, and were illegally sold therein and that its agent Weir Jepson was not licensed to offer for sale or to sell said Chase units within the State of Minnesota, and fraudulently and wilfully concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price of said Chase units and fraudulently and wilfully concealed and suppressed the fact that the market for said Chase units at the

time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market."

and in denying defendant's alternative motions to strike [fol. 1777] (R. 1171) the whole of said finding, or for a new trial upon said error (R. 1186, f. 3556).

11. The trial court erred in making *Finding of Fact numbered XVIII* (relating to non-registration of the stock) (R. 1143-1144), as follows:

"XVIII

"Plaintiff, in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed the statements and representations, and each of them, so made to her, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the State of Minnesota, and believing and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew."

and in denying defendant's alternative motion to strike (R. 1171) the whole of said finding, or for a new trial upon said error (R. 1186, f. 3557).

12. The trial court erred in making the first two paragraphs of *Finding of Fact numbered XIX* (R. 1144-1145, ff. 3431-3434), as follows (error as to third paragraph of said finding is assigned in section of "Assignments of Error" relating to alleged market manipulation):

"XIX

"By the provisions of said Blue Sky Law, Chase units were required to have been registered as therein [fol. 1778] provided, before being offered for sale or sold within the State of Minnesota. Defendant, in violation and contravention of said Law and the duties imposed upon it, wilfully and fraudulently failed to register the Chase units according to the requirements

of said Law, and the Chase units were never registered or licensed to be sold in Minnesota, and the sale thereof was never authorized in Minnesota by registration under said Law. The Chase units never were within any of the classifications of securities exempted from registration under Section 3996-2 of Chapter 21-b, *Mason's Minnesota Statutes, 1927*, and were never exempted from the operation of the provisions of said Law, and the sale thereof was never authorized in Minnesota by exemption from said Law. The sale of Chase units to plaintiff was not within any of the classifications of exempted sales specified in Section 3996-3 of said Chapter, and was not in fact excepted from the operation of said Law, nor authorized by any provision of law. Said sale to plaintiff was not an isolated sale, but was made in the course of repeated and successive sales of Chase units by defendant, which was, at the time of said sale, offering Chase units for sale, soliciting the sale thereof, and selling the same to the public generally. Defendant never applied to the Commission for the registration of Chase units or of its own capital stock, nor did it ever notify said Commission of its intention to sell Chase units or its own capital stock, and it never in fact at any time secured the license or approval of said Commission to sell, offer to sell, solicit the sale of, or attempt to sell, or negotiate or dispose of Chase units or its own capital stock.

"Defendant, at all times mentioned herein, knew [fol. 1779] and was familiar with the requirements of said Blue Sky Law and wilfully failed to register the Chase units or its own stock."

and in denying defendant's alternative motions to strike (R. 1171) the whole of said finding, or for a new trial upon said error (R. 1187, f. 3560).

13. The trial court erred in making the following portion of *Finding of Fact numbered XX* (R. 1146), as follows:

"XX

"* * * but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others in the State of Minnesota in the

course of successive and repeated sales thereof within the State of Minnesota."

and in denying defendant's alternative motions to strike (R. 1171-1172) the above portion of said finding, or for a new trial upon said error (R. 1186, f. 3558).

14. The trial court erred in making *Finding of Fact numbered XXI* (R. 1146-1147), as follows:

"XXI

"The sale by defendant through its unlicensed agent to plaintiff of said unregistered Chase units was made in Minnesota, in violation of the provisions of said Blue Sky Law and was illegal, and void, and incapable of ratification or confirmation as between the original parties to the sale. Because of the linking together of shares of Bank stock and shares of the Corporation's stock, and because an entire indivisible purchase price was required to be paid and was paid by plain- [fol. 1780] tiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was wholly illegal and wholly void."

and in denying defendant's alternative motions to strike (R. 1172) the whole of said finding, and to substitute in lieu thereof the following:

"The sale by defendant to plaintiff of said Chase units was not consummated in the State of Minnesota and was not in violation of the provisions of the Blue Sky Law of said state and was not illegal; that because of the linking together of shares of Bank stock and shares of defendant's stock, and because an entire indivisible purchase price was required to be paid and was paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was exempt from the Blue Sky Law of the State of Minnesota as being stock of a National Banking Association, and the exempt character of said Bank stock extended to the stock of defendant."

or, in the alternative, to strike (R. 1172-1173, ff. 3516-3517) from said finding the words, "void, and incapable of ratification or confirmation," appearing in the first sentence of said finding and substituting in lieu thereof the word, "voidable," and by striking the words "wholly illegal and wholly void," appearing in the second sentence of said finding and by substituting in lieu thereof the words, "illegal and voidable," or upon denial of these motions, for error in denying defendant a new trial upon the above errors (R. 1187, f. 3561).

[fol. 1781] *C. As to Alleged Market Manipulations:*

15. The trial court erred in making *Finding of Fact numbered XVI* (R. 1142-1143), as follows:

"XVI

"Plaintiff offered to buy and defendant offered to sell said Chase units at the market price and in selling said Chase units to plaintiff, defendant represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at which plaintiff purchased said units from defendant was determined by lawful and legitimate factors of supply and demand and was free from any manipulation or control by defendant."

and in denying defendant's alternative motions to strike (R. 1171) the whole of said finding, or for a new trial upon said error (R. 1188).

16. The trial court erred in making *Finding of Fact numbered XVII* (R. 1143), as follows:

"XVII

"In selling said Chase units to plaintiff, defendant fraudulently and wilfully suppressed the facts concerning the nature and formation of said Bank and its affiliate, Chase Securities Corporation, and fraudulently and wilfully concealed and suppressed the fact that said Chase units were not registered for sale within the State of Minnesota, and were illegally sold therein and

that its agent Weir Jepson was not licensed to offer for [fol. 1782] sale or to sell said Chase units within the State of Minnesota, and fraudulently and wilfully concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price of said Chase units and fraudulently and wilfully concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market."

and in denying defendant's alternative motions to strike (R. 1171) the whole of said finding, or for a new trial upon said error (R. 1188).

17. The trial court erred in making *Finding of Fact numbered XVIII* (R. 1143-1144), as follows:

"XVIII

"Plaintiff, in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed the statements and representations, and each of them, so made to her, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the State of Minnesota, and believing and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew."

and in denying defendant's alternative motions to strike (R. 1171) the whole of said finding, or for a new trial upon [fol. 1783] said error (R. 1188).

18. The trial court erred in making the third paragraph of *Finding of Fact numbered XIX* (R. 1145-1146, ff. 3435-3436), as follows:

"XIX

". . . . . .

"As hereinafter more specifically found, for a considerable time prior to August 8, 1929, and on said

date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the Commission to enable it to determine whether said securities should be registered and to properly pass on an application for registration, and, with such knowledge, attempted to evade the law requiring the Chase units to be registered and licensed."

and in denying defendant's alternative motions to strike (R. 1171) the whole of said paragraph, or for a new trial upon said error (R. 1188-1189, ff. 3564-3565).

19. The trial court erred in making *Finding of Fact numbered XXII* (R. 1147), as follows:

"XXII

"At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; [fol. 1784] the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to *bona fide* bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant, as hereinafter more particularly set forth."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1189).

20. The trial court erred in making the last three words (italicized) of *Finding of Fact numbered XXIII* (R. 1147, f. 3441), as follows:

"XXIII

"Prior to January 12, 1928, the stock for the Chase National Bank was listed on the New York Stock Exchange, and on said date was delisted at the request of said Bank. The stock of the Chase Securities Cor-

poration was never listed on said New York Stock Exchange. After January 12, 1928, said units were traded in exclusively on the over-the-counter market *maintained by defendant.*"

and in denying defendant's alternative motions to strike (R. 1173) said words from said finding, or for a new trial upon said error (R. 1189).

21. The trial court erred in making *Finding of Fact numbered XXIV* (R. 1148), as follows:

"XXIV

"At the time of the sale of said units by defendant to plaintiff, and for a considerable time prior and subsequent thereto, defendant was engaged in a vigorous [fol. 1785] and extensive campaign for the retail sale of said units to the public, for the purpose of creating a larger clientele to whom defendant could sell and distribute stocks, bonds and other securities from time to time at a profit."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1189-1190).

22. The trial court erred in making *Finding of Fact numbered XXV* (R. 1148), as follows:

"XXV

"At all times herein mentioned, Metpotan Securities Corporation was a corporation organized and existing under the laws of the State of New York, and all of its capital stock was owned by defendant. All of the officers of said Metpotan Securities Corporation were likewise officers of defendant."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1190).

23. The trial court erred in making *Finding of Fact numbered XXVI* (R. 1148-1149), as follows:

"XXVI

"On September 21, 1927, defendant, through its wholly owned subsidiary, Metpotan Securities Corpo-

ration, entered into a joint account or pool with McClure, Jones & Co., Potter & Co., and Blair & Co., to buy and sell Chase units. The letter and agreement confirming the organization of said pool was offered [fol. 1786] and received in evidence as Plaintiff's Exhibit A-25, and is hereby expressly made a part of these Findings with like effect as though fully set out herein. The pool originally was to run for a period of sixty (60) days, commencing September 21, 1927, but was subsequently continued until March 20, 1928, and again extended until April 18, 1928. During all of said period said Metpotan Securities Corporation was the pool manager and in direct charge and control of the operations of said pool. Said Metpotan Securities Corporation was financed by defendant, and defendant furnished to it credit necessary for the carrying on of said pool activities. On December 31, 1927, said Metpotan Securities Corporation was indebted to defendant on account of advances to it in connection with said pool activities in the sum of $3,235,000. During all of said period, defendant, through Metpotan Securities Corporation, daily bought and sold large blocks of said units. During the period commencing with September 21, 1927, and up to April 18, 1928, said pool purchased 22,217 units ($100 par) for $13,240,356.32, which units were sold at a profit to the pool of $50,620.73. At the time the account was opened, the quotation for Chase Securities units ($100 par) was 575 bid, 580 asked; and on April 18, 1928, the date the account was closed, the quotation was 684 bid, and 690 asked."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1190).

24. The trial court erred in making *Finding of Fact numbered XXVII* (R. 1149-1150), as follows:

[fol. 1787] "XXVII

"Immediately upon the close of this trading account, on April 18, 1928, another pool or trading account was formed with Metpotan Securities Corporation, Blair & Co., McClure, Jones & Co., and Potter & Co., as participants, and with Metpotan Securities Corporation

and Blair & Co., carrying stock for this account. A letter from Metpotan Securities Corporation to Potter & Co., dated April 18, 1928, constituting the agreement defining the terms by which this pool was organized, was offered and received in evidence, marked Exhibit A-26, and is hereby made a part of these Findings with like effect as though fully set out herein. As in the earlier pool, the Chase Securities Corporation financed the activities of the pool by advancing and loaning to Metpotan Securities Corporation such moneys as were required from time to time for that purpose. On December 31, 1928, Metpotan Securities Corporation was indebted to defendant on account of such advances in the amount of $3,461,000. 59,552 shares were purchased by this syndicate or pool at a total cost of $50,180,175.30, and the pool continued its operations until April 9, 1929, and during its existence all of said shares were resold by the pool, with a profit of $554,760.42. The average price to the pool and its members was about $800 per unit, the price of the stock having risen during the life of the pool from an interim low of $435 per unit."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1190-1191).

25. The trial court erred in making *Finding of Fact numbered XXVIII* (R. 1150-1151,), as follows:

[fol. 1788] "XXVIII

"On April 10, 1929, another pool in the stock of the Chase National Bank and Chase Securities Corporation was formed, with Metpotan Securities Corporation, McClure, Jones & Co., Broomhall, Killough & Co., Inc., and Potter & Co., as participants. A letter dated April 10, 1929, from Metpotan Securities Corporation to Broomhall, Killough & Co., Inc., constituting the agreement defining the terms by which said pool was organized, was offered and received in evidence, marked Exhibit A-27, and is hereby expressly made a part of these Findings with like effect as though fully set out herein. Said pool was managed and controlled by Metpotan Securities Corporation. 12,630 units of $100 par value stock, and 442,934 units of $20

par value stock were bought for $103,216,184.84, the money to effect these purchases being advanced by the Metpotan Securities Corporation and the defendant Chase Securities Corporation. The account was terminated on July 3, 1930, with 38,440 units remaining in the account at an average cost to the participants of $167.85, the market price at that time being $140 per unit. The profit to the pool was $321,250.14."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1191).

26. The trial court erred in making *Finding of Fact numbered XXIX* (R. 1151-1153), as follows:

"XXIX

"On July 19, 1929, defendant caused to be formed another pool in Chase units with Dominick & Dominick, as pool managers. (Exhibits A-28, A-33, A-34). [fol. 1789] Dominick & Dominick was a banking house which in 1929 had a stock commission business in the City of New York and held a membership on the New York Stock Exchange. This pool was formed on July 19, 1929, on the basis of an original allotment of 25,000 shares, with full discretionary powers granted to Dominick & Dominick to operate and manage the pool. An option was given by defendant to said pool managers to purchase from it 80,000 shares for the operations of the pool on the following scale of ascending prices:

20,000 shares at $219 per share
10,000 shares at $220 per share
10,000 shares at $225 per share
10,000 shares at $230 per share
10,000 shares at $235 per share
10,000 shares at $240 per share

(Exhibits A-28, A-33.)

"At the time of the giving of said options the price of said Chase units was at or below the lowest price specified in said option.

"As pool managers, pursuant to agreement with defendant, Dominick & Dominick had the sole management and charge of the entire conduct of the business and affairs of the pool, with all the usual powers granted to a pool manager, including the right on behalf of the pool to make or procure loans and to pledge the obligations of the pool participants therefor, to pay all commissions and expenses of every nature, and on behalf of the pool, to purchase, sell, sell short, repurchase, resell or hold Chase units, in such amounts and at such prices, and in such manner as they might deem advisable, and generally to act in all respects as in their opinion might be to the best interests of the pool; provided, only, that the pool at no time was to be short or long, or to be committed for an amount in [fol. 1790] excess of 25,000 units. In addition to being the managers of the pool, Dominick & Dominick were participants in the profits, along with the other participants in the pool, including defendant. In order to prevent stock which was distributed by the pool managers to the participants for retail distribution from coming back onto the market so as to interfere with pool sales operations, a penalty of $2 per unit was assessed against any participant for each unit of stock which was repurchased in the market by the pool during the period of the pool at or below the price at which it was originally taken down from the pool by the participants. Dominick & Dominick exercised the option to purchase and purchased from defendant and its affiliate corporations, Chase units in the quantities and at prices specified in the option letters (Exhibits A-28 and A-33) at a profit to the sellers of said Chase units of an amount in excess of one million dollars. The pool ran from July 19, 1929, to November 11, 1929. During that time 172,806 units were bought and 115,483 units were sold. 55,227 units were distributed to the participants. The profits accruing to the pool amounted to $1,452,314.68, and defendant received $261,416.64 as its share of said pool profits."

and in denying defendant's alternative motions to strike (R. 1178) the whole of said finding, or for a new trial upon said error (R. 1191).

27. The trial court erred in making *Finding of Fact numbered* XXX (R. 1153-1154), as follows:

"XXX

"During the year 1928, defendant and its wholly owned subsidiary Metpotan received profits from pool [fol. 1791] activities in Chase units in the amount of $726,846.01, and received profits from said pool activities in Chase units during the year 1929 in the amount of $1,801,769.99. The following is a schedule showing purchases and sales by defendant and Metpotan of Chase units in 1928 and 1929:

Chase Units (old)	Purchases		Sales	
	Shares	Money	Shares	Money
1928	71,869	$45,973,648.08	70,758	$45,753,743.55
1929	61,106	66,044,849.87	61,623	65,804,381.48
Chase Units (new)				
1929	716,009.6	150,692,148.92	684,709	145,815,916.83
Chase National Bank and Chase Securities Corporation Rights				
1928	74,272	3,942,521.46	74,275	3,942,654.92
1929	67,230.2	9,364,195.29	67,229.2	9,364,125.88

In 1928 and 1929 Chase, through its pools, bought and sold shares and rights involving a total volume of over a half billion dollars."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1192).

28. The trial court erred in making *Finding of Fact numbered XXXI* (R. 1154-1156), as follows:

"XXXI

"During the years 1928 and 1929, the defendant itself and through its wholly owned subsidiary and adjunct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and

sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in [fol. 1792] which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts for the purpose of dealing in its own capital stock. Defendant participated in said pools and trading accounts through its wholly owned subsidiary Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a convenience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which defendant was thereby able to exert on the over-the-counter market for said units, and the price at which said units were sold to the public.

"By reason of said pools and defendant's participation therein, an appearance of great interest and activity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools.

"Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant and its associates, and by informa- [fol. 1793] tion disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the securities on the part of the purchasing public was created, and plaintiff was induced to purchase."

and in denying defendant's alternative motions to strike (R. 1173) the whole of said finding, or for a new trial upon said error (R. 1192).

29. That the trial court erred in receiving and considering, over the objection of defendant properly made, and ruling excepted to at the time of trial, hearsay and incompetent evidence in the form of a printed report by the Subcommittee of the Committee on Banking and Currency of the United States Senate of the 72nd Congress (Ptf's Exs. A-56 and A-57) and relating to hearings conducted by said Subcommittee between the dates of October 17 and October 25, 1933, and between October 26 and November 10, 1933, which were the sole basis of the Findings of Fact numbered XVI, XVII, XVIII, XIX, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXVII, as shown by said findings and by the court's denying defendant's motions, made at the conclusion of the trial and upon motion for amended findings, to strike such incompetent evidence from the record, and in denying defendant's motion for a new trial upon such error (R. 1193).

30. That the trial court erred in receiving and considering, over the objection of defendant properly made, and [fol. 1794] ruling excepted to at the time of trial, hearsay and incompetent evidence in the form of the testimony of one Henry Hargreaves in the record of the case of *Segal v. Chase Securities Corporation* (Ptf's Ex. A-54½), and also the affidavit of one Henry Hargreaves out of the files of the case of *Hillard H. Holm v. Chase Securities Corporation* (Ptf's Ex. A-54), which were the sole basis of the Findings of Fact numbered XVI, XVII, XVIII, XIX, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIII, XXIX, XXX, XXXI, and XXXVII, as shown by said findings and by the court's denying defendant's motions, made at the conclusion of the trial and upon motion for amended findings, to strike such incompetent evidence from the record, and in denying defendant's motion for a new trial upon said error (R. 1193-1194).

D. As to the Nature of Action and Discovery of Alleged Fraud:

31. That the trial court erred in making *Finding of Fact numbered XXXII* (R. 1156-1157), as follows:

"XXXII

"Plaintiff did not discover the falsity of defendant's statements and representations or any of them, nor did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts con-
[fol. 1795] cealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action, notwithstanding due diligence on her part.

"In so far as plaintiff's cause of action is founded on representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for 'relief on the ground of fraud' in which case, as provided in *Mason's Minnesota Statutes, 1927*, Section 9191, the cause of action is not 'deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.' Plaintiff not having discovered the facts constituting defendant's fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the State of Minnesota.

"In so far as the provisions of *Laws of Minnesota, 1941*, Chapter 547, Sec. 18 (*Mason's Stat. 1927*, Sec. 3996-24, as amended), are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota."

and in denying defendant's alternative motions to strike the whole of said finding and to substitute in lieu thereof the following:

"That the summons and complaint in this action were delivered to the Commissioner of Securities as defendant's agent for service of process on November 22,
[fol. 1796] 1937; that said delivery and attempted serv-

ice upon defendant was made more than six years after the sale of said Chase units."

or for a new trial upon said error (R. 1194).

E. As to Tender, Ratification and Estoppel:

32. That the trial court erred in making *Finding of Fact numbered XXXIII* (R. 1157-1158), as follows:

"XXXIII

"Promptly upon discovery of the illegality of said sale, and on or about October 11, 1937, plaintiff formally repudiated said transaction and demanded a refund and return to her of the purchase price thereof, with interest, and tendered to defendant her certificates of stock, together with dividends and other income received by plaintiff therefrom, with interest. Defendant rejected said tender and refused to recognize plaintiff's repudiation of said transaction. In her complaint in this action and upon the trial, plaintiff renewed her tender and it was again refused by defendant. Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and [fol. 1797] offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest."

and in denying defendant's alternative motions to strike (R. 1174) from said finding the words, "Promptly upon discovery of the illegality of said sale, and," appearing in the first sentence thereof, and by striking (R. 1194-1195) from said finding the following:

"Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and

useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest."

or for a new trial upon said error (R. 1197).

33. The trial court erred in making *Finding of Fact numbered XXXIV* (R. 1158-1159), as follows:

"XXXIV

"Plaintiff from time to time before said discovery, as well as after said tenders and refusals thereof, re-[fol. 1798]ceived and accepted dividends upon said stock as follows:

Dividends on Chase Units:

October 1, 1929	$8.00
January 1, 1930	8.00
April 1, 1930	9.00
July 1, 1930	9.00
October 1, 1930	9.00
January 2, 1931	9.00
April 1, 1931	9.00
July 1, 1931	9.00
October 1, 1931	9.00
January 2, 1932	9.00
April 1, 1932	6.75
July 1, 1932	4.50
October 1, 1932	4.50
January 2, 1933	4.50
April 1, 1933	4.50
July 1, 1933	3.15
October 1, 1933	2.99
January 2, 1934	2.99
April 1, 1934	3.15
August 1, 1934	4.23

Dividends on Chase Units:

February 2, 1935	6.30	
August 1, 1935	6.30	
February 1, 1936	6.30	$148.16

Dividends on Chase National Bank Stock:

August 1, 1936	$6.30	
February 1, 1937	6.30	
August 1, 1937	6.30	
February 1, 1938	6.30	
August 1, 1938	6.30	
February 1, 1939	6.30	$ 37.80

[fol. 1799] *Dividends on Amerex Holding Corporation Stock:*

July 15, 1936	$ .50	
February 1, 1937	.50	
August 1, 1937	.50	
February 1, 1938	.70	
August 1, 1938	.70	
February 1, 1939	.70	$ 3.60

"The total of the dividends so received up to and including June 10, 1939, was $189.56."

in so far as it found that plaintiff received and accepted dividends upon the stock before her discovery of the alleged facts claimed to constitute the fraud, and in denying defendant's alternative motions to strike (R. 1174) from said finding the words "said discovery," appearing in the first sentence thereof, or for a new trial upon said error (R. 1197).

34. In making *Finding of Fact numbered XXXVI* (R. 1160-1161), as follows:

"XXXVI

"Subsequent to the time plaintiff purchased the said Chase units, there were numerous changes in the capitalization of the Bank and of defendant, as set forth in Paragraph XI, sub-division 8 of defendant's answer. Such changes were not confined to the individual shares sold to plaintiff, but affected all of the capital stock of both corporations. The changes resulted from action

of the Bank and/or defendant or their respective stockholders in the course of the operation of the Bank or defendant. They could be made without the consent of the owners of any particular shares. Plaintiff from [fol. 1800] time to time was advised of such changes, but she did not actively participate therein, except as she acted as a stockholder before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

"Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing."

and in denying defendant's alternative motions to strike (R. 1174-1175) from said finding the following:

"before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereto to plaintiff and must be regarded as within the contemplation of the parties at the time.

"Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing."

or for a new trial upon said error (R. 1197-1198).

[fol. 1801] *F. As to Damages:*

35. The trial court erred in making *Finding of Fact numbered XXXV* (R. 1160), as follows:

"XXXV

"By reason of the premises, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together with interest thereon at the rate of six per cent (6%) per annum from and after

August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof."

and in denying defendant's alternative motions to strike (R. 1174) the whole of said finding, or for a new trial upon said error (R. 1198).

G. As to Jurisdiction of Court Over Defendant:

36. That the trial court erred in denying, at the outset of the trial, the motion of defendant appearing specially (R. 17-45) to quash service of process attempted upon defendant, as to which proper and timely motion was made by defendant at the commencement of the action (R. 82, ff. 244-245) and as to which proper exception and reservation of exception were taken by defendant and allowed by the court and renewing defendant's objections to the jurisdiction of the court over the person of defendant and the subject matter of the action.

[fol. 1802] *H. As to Defendant's Motions to Strike Evidence Made at Conclusion of Trial:*

37. The trial court erred in making *Finding of Fact numbered XXXVII* (R. 1161), as follows:

"XXXVII

"Except as hereinbefore specifically found, the Court finds the allegations of defendant's Answer not true and not sustained by the evidence, and defendant's motion for amended findings and conclusions of law, and defendant's motion to strike certain items of evidence (as appears from defendant's notice of motion dated May 14, 1941, on file herein) are in all things denied."

by which the court denied the following motions of defendant, made at the conclusion of the trial, for all the reasons and upon all the grounds of objection urged at the time, and also at the time that the documents or testimony described were offered during the trial:

(a) The motion to strike the following exhibits of plaintiff identified and offered upon the examination of plaintiff's witness Charles L. Hayes, as follows:

Plaintiff's Exhibit A (R. 621-639), identified and offered as the application for the broker's license in 1928 (offered at R. 99, f. 295);

Plaintiff's Exhibit C (R. 643-653), identified and offered as the application for the 1929 broker's license (offered at R. 101, f. 303);

Plaintiff's Exhibit E (R. 655-665), identified and offered as the application for the 1930 broker's license (offered at [fol. 1803] R. 102, f. 306);

(b) The motion to strike Plaintiff's Exhibit G (R. 667), identified and offered as a letter dated July 2, 1931, purportedly signed by H. Hargreaves, relating to a cancellation of broker's license (offered at R. 104, f. 311).

(c) The motion to strike Plaintiff's Exhibit J (R. 673), being the list of agent's licenses, including licenses issued after the transaction in suit (offered at R. 107, f. 321).

(d) The motion to strike Plaintiff's Exhibit K (R. 674), identified as a letter dated June 29, 1929, purportedly signed by one Fitzgerald and addressed to the Commissioner of Securities (offered at R. 112, f. 334).

(e) The motion to strike Plaintiff's Exhibit R-3 (R. 703), identified by the witness Helen Chapman, and described as the Chicago office security ticket (offered at R. 147, f. 440).

(f) The motion to strike the conversation between plaintiff and Weir Jepson relative to the purchase of eight shares of the stock here involved, commencing at R. 172, f. 516, and ending at R. 176, f. 528.

(g) The motion to strike the testimony of plaintiff, found at R. 176, f. 526, and continuing to R. 179, f. 535, relating to the fact that if she knew or believed that the stock was not registered, she would not have purchased it.

[fol. 1804] (h) The motion to strike that portion of plaintiff's testimony at R. 179, f. 535, where she was permitted, over objection of defendant, to state her reasons why she would not have purchased Chase stock if she knew it was not registered.

(i) The motion to strike that portion of plaintiff's testimony at R. 179, ff. 536-537, where she was permitted to state, over objection of defendant, that she would not have pur-

chased the stock if she had known that Mr. Jepson was not licensed, in Minnesota and that the sale by him was illegal.

(j) The motion to strike that portion of plaintiff's testimony given upon re-direct examination that she did not discover that the Chase stock was not registered until about October 11, 1937 (at R. 271, f. 811, to R. 273, f. 818).

(k) The motion to strike that portion of plaintiff's testimony given upon re-direct examination to the effect that she did not discover that Mr. Jepson was not licensed in Minnesota until about October 11, 1937 (at R. 273, ff. 817-818).

(l) The motion to strike that portion of plaintiff's testimony (at R. 273, ff. 818-819) that she had not heard that the Chase Securities Corporation was engaged in pool operations and in manipulation of stock prior to October 11, 1937.

(m) The motion to strike the following plaintiff's exhibits, all having to do with the so-called pools:

[fol. 1805] Plaintiff's Exhibit A-25 (R. 773), identified as a photostatic copy of a letter dated September 21, 1927, purportedly addressed to Blair & Company, and signed by the Metpotan Securities Corporation (offered at R. 320, f. 960, to R. 323, f. 968);

Plaintiff's Exhibit A-26 (R. 775), identified as a photostatic copy of a letter addressed to Potter & Company, dated April 18, 1928, purportedly signed by Metpotan Securities Corporation (offered at R. 324, f. 971);

Plaintiff's Exhibit A-27 (R. 777), identified as a letter dated April 10, 1929, addressed to Broomhall, Killough & Company, and purportedly signed by Metpotan Securities Corporation (offered at R. 326, f. 976);

Plaintiff's Exhibit A-28 (R. 779-781), identified as a letter dated July 19, 1929, addressed to the Chase Securities Corporation, and purportedly signed by Dominick & Dominick (offered at R. 327, ff. 979-981);

Plaintiff's Exhibit A-29 (R. 783), identified as a letter from Metpotan Securities Corporation to Blair & Company, dated April 26, 1927 (offered at R. 344-345, ff. 1032-1034);

Plaintiff's Exhibits A-30 and A-31 (R. 785-787), a letter purportedly from Dominick & Dominick to Chase Securities Corporation in reference to the formation of a trading account, dated January 7, 1930 (offered at R. 345, f. 1035);

Plaintiff's Exhibit A-32 (R. 789), identified as a letter from the Chase Securities Corporation to the Metpotan [fol. 1806] Securities Corporation, dated January 9, 1930, stating that the trading account was entered into for Metpotan Securities Corporation (offered at R. 346, f. 1037);

Plaintiff's Exhibit A-33 (R. 791), identified as a letter from Dominick & Dominick to Chase Securities Corporation, dated July 19, 1929, and the accompanying letter (offered at R. 346, f. 1038);

Plaintiff's Exhibit A-34 (R. 793), identified as a letter from the Chase Securities Corporation to the Metpotan Corporation, dated July 24, 1929, stating that it turned over its interests in the account to Metpotan (offered at R. 346, f. 1038);

Plaintiff's Exhibit A-38, (R. 807-809), identified as stock certificate No. 1 of the Metpotan Securities Corporation for 125 shares issued to William H. Cooper (offered at R. 352, ff. 1055-1056);

Plaintiff's Exhibit A-39 (R. 811-813), identified as certificate No. 3 of the Metpotan Securities Corporation, issued in the name of Henry Hargreaves (offered at R. 352, f. 1056).

(n) The motion to strike the following plaintiff's exhibits, all offered to establish intentional violation of the Blue Sky Law by defendant;

Plaintiff's Exhibit A-42 (R. 821), identified as a statement of the capital stock increases, surplus, yearly profits, etc., offered for the purpose of showing an intentional violational of the Blue Sky Law of Minnesota (offered at R. 357, ff. 1070-1071);

Plaintiff's Exhibit A-43 (R. 823), another statement offered for the same purpose (offered at R. 358, f. 1073);

[fol. 1807] Plaintiff's Exhibit A-44 (R. 825-837), identified as the annual report for 1928 (offered at R. 361, f. 1081);

Plaintiff's Exhibit A-49 (R. 839-851), identified as the annual report for 1927 (offered at R. 364, f. 1090);

Plaintiff's Exhibit A-50 (R. 853-859), identified as the annual report for 1929 (offered at R. 363, f. 1089).

(o) The motion to strike Plaintiff's Exhibits A-52 and A-53 (R. 863-864), identified as certified copies of resolutions of the board of directors of Chase Securities Corpora-

tion relative to the official position of Mr. Hargreaves (offered at R. 366, ff. 1096-1098).

(p) The motion to strike Plaintiff's Exhibit A-54 (R. 370), identified as part of an affidavit purportedly made and signed by Henry Hargreaves, and filed in the case of *Hillard Holmes* v. *Chase Securities Corporation* (offered at R. 368-369, ff. 1104-1107).

(q) The motion to strike each and every part and portion of the record offered from the transcript of the Segal case, Plaintiff's Exhibit A-54½ (R. 865-954) (offered at R. 385-390, ff. 1155-1168).

(r) The motion to strike Plaintiff's Exhibits A-55, A-56 and A-57 (R. 971-1005), being the so-called Pecora reports and each and every part offered therefrom and each and all of the exhibits identified from the books and offered from [fol. 1808] said books (offered and read into the record, with intermittent objections of defendant, from R. 391 to R. 559).

I. As to Affirmative Defenses in Answer:

38. The trial court erred in making *Finding of Fact numbered XXXVII* (R. 1161), by which it ruled as to certain affirmative defenses contained in the Answer:

> "(a) That the transaction giving rise to plaintiff's cause of action was made and consummated in Minnesota, and not outside the said state (Finding of Fact numbered XIII (R. 1140-1141) and XXI (R. 1146-1147)).
>
> "(b) That the Blue Sky Law of Minnesota applied to the transaction and rendered void the sale of the stock in question (Finding of Fact numbered XXI, R. 1146-1147).
>
> "(c) That the shares of stocks in The Chase National Bank of the City of New York and Chase Securities Corporation were securities and were subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities not exempt therefrom (Finding of Fact numbered XXI, R. 1146-1147).
>
> "(d) That plaintiff's cause of action accrued within six years before the commencement of this action and

is not barred by the statute of limitations (Finding of Fact numbered XXXII, R. 1156-1157).

"(e) That plaintiff was not barred from rescinding the sale of said stock and maintained this action on the grounds of laches, ratification and estoppel (Finding of Fact numbered XXXVI, R. 1160-1161).

"(f) That plaintiff was not barred from rescinding [fol. 1809] the sale of said stock and maintaining this action due to fundamental changes in the corporate structure of said Chase National Bank and defendant corporation which altered materially and substantially her interest in said corporations" (Finding of Fact numbered XXXVI, R. 1160-1161).

39. The trial court erred in making *Finding of Fact numbered XXXVII* (R. 1161), by which it failed to rule and determine, as to the affirmative defenses pleaded by defendant in its Answer:

"(a) That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

"(b) That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

"(c) That the shares of stocks of The Chase National Bank of the City of New York and Chase Securities Corporation were securities not subject to the registration provisions of the Blue Sky Law of Minnesota, and were securities exempt therefrom.

"(d) That the Minnesota Blue Sky Law, if applied to said transaction between plaintiff and defendant would deprive defendant of its property without due process of law, in violation of the provisions of Section 7 of Article 1 of the Constitution of the State of Minnesota, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

"(e) That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as

being in contravention of Section 8, Article 1, of the Constitution of the United States of America, which confers upon Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes.

"(f) That the Blue Sky Law of Minnesota is unconstitutional and void as applied to this transaction as impairing the obligations of simultaneous transfer of the shares of stock of the said The Chase National Bank of the City of New York with shares of stock of the Chase Securities Corporation provided for in the Deposit Agreement entered into on about March 21, 1917, between the stockholders of the said Bank, a committee of stockholders, and the Bankers Trust Company of New York, and provided for in the Certificate of Incorporation of the Chase Securities Corporation; both of which, said contracts, became effective prior to June 21, 1917, and prior to the effective date of the first Blue Sky Law of Minnesota.

"(g) That plaintiff's cause of action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations.

"(h) That plaintiff either discovered or with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted commencement of this action and that the cause of action, if any, is barred by the statute of limitations.

"(i) That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept [fol. 1811] service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action.

"(j) That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

"(k) That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structures of said Chase National Bank and defendant corporation which altered materially and substantially his interest in said corporations."

40. The trial court erred in denying defendant's alternative motions to strike (R. 1175) the whole of said *Finding of Fact numbered XXXVII* (R. 1161), and to substitute in lieu thereof the following:

"The court finds that the allegations of defendant's answer are true and sustained by the evidence, and defendant's motions for amended findings and conclusions of law, and defendant's motions to strike certain testimony and evidence (as appears from defendant's notice of motion dated May 14, 1941, on file herein) are in all things granted."

or for a new trial upon said error (R. 1199).

41. The trial court erred in denying defendant's motion to amend the findings of fact (R. 1175-1176), by adding to said findings the following paragraphs:

[fol. 1812]

"XXII

"In connection with said sale defendant made no false representations of fact, express or implied, to plaintiff with respect to the registration of said stock, the licensing of its agent, Weir Jepson, or any other material fact nor did it by its words or conduct make any false representations, express or implied, to plaintiff or create a false appearance with respect to any material fact.

"XXIII

"In connection with said sale defendant did not hide, conceal or suppress any material fact from the plaintiff, nor did it engage in any course of conduct designed to hide or conceal any material facts from the plaintiff or designed to prevent and hinder the plaintiff from knowing and obtaining knowledge of all material facts.

"XXIV

"That plaintiff had full knowledge of all facts with respect to absence of registration of said stock and all

other material facts regarding said sale to her more than six (6) years prior to the commencement of this action.

"XXV

"Except as hereinbefore specifically found, the court finds the allegations of plaintiff's complaint not true and unsubstantiated."

J. As to the Conclusions of Law:

42. The trial court erred in making Conclusion of Law numbered 1 (R. 1161), as follows:

"1. Plaintiff is entitled to judgment against defendant in the sum of $1,828.00, plus interest thereon, at the [fol. 1813] rate of six per cent per annum from August 23, 1929, less the sum of $189.56 (the total of dividends received by plaintiff from defendant), together with interest on each dividend item at the rate of six per cent per annum from the date of receipt thereof by plaintiff (said dividends and dates of receipt thereof by plaintiff are set forth in paragraph XXXIV of the foregoing findings of fact), together with her costs and disbursements herein."

and Conclusion of Law numbered 2 (R. 1161-1162), as follows:

"2. Upon satisfaction by defendant of said judgment, plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, Certificate No. 170 762 for 9 shares of common stock in Chase National Bank of the City of New York, and Certificate No. 067 711 for 1 share of common stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificates shall, upon execution of proper receipt therefor be delivered to defendant; and plaintiff shall, in addition, deliver or pay to said Clerk for delivery and payment to defendant, all dividends received by her on said stock since June 10, 1939, with interest at the rate of six per cent per annum from the date of the receipt thereof by plaintiff."

and in denying defendant's motion to strike (R. 1176-1179) the whole of said conclusions of law and to substitute the following in lieu thereof:

"a. The only cause of action, if any, established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute' within [fol. 1814] the meaning of *Section 9191 subdivision 2, Mason's Minn. Stat., 1927*, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 547, Laws of Minn., 1941.

"b. There is no substantial evidence to establish a cause of action for relief on the ground of fraud either express or implied, in favor of the plaintiff, and the action is not one for relief on the ground of fraud within the meaning of *Section 9191, subdivision 6, Mason's Minn. Stat., 1927*.

"c. There is no competent evidence from which the court would be justified in finding that the market for said Chase units was controlled and manipulated by defendant or by any person or persons and the matter relating to so-called market control and manipulation which was admitted subject to objection has been disregarded.

"d. Defendant's motions to strike the matter offered from the so-called Pecora reports, identified as Plaintiff's Exhibits A-55, A-56, and A-57, and the matter offered from the Segal case are granted.

"e. That the transaction giving rise to plaintiff's cause of action was not made and consummated in Minnesota, but was made and consummated outside of the state and that the Blue Sky Law of Minnesota did not apply to the transaction.

"f. That the transaction between plaintiff and defendant was directly in interstate commerce to which the Blue Sky Law of Minnesota was without application.

"g. That the shares of stocks of The Chase National Bank of the City of New York and Chase Securities

Corporation were securities not subject to the registra-
[fol. 185] tion provisions of the Blue Sky Law of Min-
nesota, and were securities exempt therefrom.

"h. That plaintiff either discovered or, with the exercise of reasonable diligence could have informed herself, as to all facts and matters alleged in the complaint more than six years prior to the attempted commencement of this action and that the cause of action, if any, is barred by the statute of limitations.

"i. That the Commissioner of Securities of Minnesota, to whom the summons and complaint herein were delivered for service in this case, was not authorized or qualified under the statutes of this state to accept service of process in this action on behalf of defendant, and that the attempted service was not effective to give the court herein jurisdiction over defendant in this action.

"j. That plaintiff is barred from rescinding the sale of said stock and maintaining this action on the grounds of laches, ratification and estoppel.

"k. That plaintiff is barred from rescinding the sale of said stock and maintaining this action due to fundamental changes in the corporate structures of said Chase National Bank and defendant corporation which altered materially and substantially her interest in said corporations; that said changes preclude plaintiff from restoring defendant to status quo; and that any tender of stock or dividends thereon to defendant has been and is legally ineffectual to accomplish restoration of status quo to defendant.

"Let judgment be entered for defendant dismissing the action and against plaintiff for its costs and disbursements."

or for a new trial upon said error (R. 1210).

[fol. 1816] IN SUPREME COURT OF MINNESOTA

32988

(DONALD L. POMEROY), JAMES D. BAIN, Admr. of Estate of Donald L. Pomeroy, Deceased, Substituted as Appellant, Appellant,

v.

NATIONAL CITY COMPANY, Also Known as City Company of New York, Inc., Respondent

OPINION—Filed December 31, 1943

Per CURIAM:

For the reasons stated in the opinion in Donaldson v. Chase Securities Corp. (No. 33458) — Minn. —, — N. W. (2d) —, filed herewith, the order sustaining the demurrer to the amended complaint in the case at bar must be reversed.

So ordered.

[fol. 1817] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

33458

(RUTH CHASE DONALDSON), FRANK A. DONALDSON and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, Deceased, Substituted as Respondents, Respondents,

v.

CHASE SECURITIES CORPORATION, Now Known as Amerex Holding Co., Appellant

SYLLABUS

1. Where shares of the stock of a New York corporation organized for the purpose of dealing in securities were so inseparably combined and consolidated with the shares of a New York national bank that the shares of neither could be sold or transferred without a like number of the other, the corporate stock was required to be registered

under Mason St. 1927, § 3996-4, before it could be lawfully sold in this state although the bank stock was immune from registration.

2. Unless barred by the statute of limitations, a purchaser of unregistered stock which by the terms of § 3996-4 is required to be registered may recover the purchase price thereof.

3. Under the provisions of Minn. St. 1941, § 80.26 (Mason St. 1941 Supp. § 3996-24), a cause of action arising out of a violation of Mason St. 1927, § 3996-4, may be brought within one year from the effective date of § 80.26, although more than six years had elapsed since the delivery of the unregistered stock at the time of the enactment of § 80.26.

[fol. 1818] 4. The fact that more than six years had elapsed prior to the enactment of § 80.26 and that under the general statute of limitations then in force a cause of action arising out of the violation of § 3996-4 was barred did not prevent the legislature by § 80.26 from lifting the bar of the statute of limitations, because the general statute of limitations applied merely to the remedy and did not vest such a right in the defendant that the legislature could not lift the bar. A general statute of limitations does not operate as payment of a debt or as satisfaction of liability for tort.

5. The proviso of § 80.26 applies to cases already pending as well as to those not instituted at the time that § 80.26 was enacted.

Judgment affirmed.

Opinion.—Filed December 31, 1943

Henry M. Gallagher, Chief Justice.

This case comes here on appeal from a judgment for the plaintiffs as executors of the estate of Ruth Chase Donaldson, deceased. She originally brought the action but died after this appeal, and the executors were substituted in this court. She will hereinafter be referred to as the plaintiff. The action was brought in tort to recover as damages the purchase price of unregistered securities sold in Minnesota to plaintiff by defendant, a New York corporation, in August 1929, in alleged violation of the securities law of this

state (Mason St. 1927, § 3996-4) which required their registration. It also sought recovery on the ground of deceit based on misrepresentation, but in view of our disposition of the case we need not consider that phase of the case. [fol. 1819] On the trial below the court found in favor of plaintiff on the basis of a violation of the statute, holding as against the defendant's plea of the statute of limitations that the statute had been tolled by defendant's withdrawal from the state on June 30, 1931. It therefore did not make findings on the deceit issue. On appeal, this court held that the general six-year statute had run against plaintiff because, notwithstanding the withdrawal of defendant from this state, service of summons could at all times have been made either on the secretary of state or the commissioner of securities as defendant's agents to receive service. The case then went back for findings on the deceit issue, which were in favor of plaintiff. Pomeroy v. National City Co. 209 Minn. 155, 296 N. W. 518; Donaldson v. Chase Securities Corp. 209 Minn. 165, 296 N. W. 518.

The securities sold to plaintiff were eight shares of the combined or consolidated stock of the Chase National Bank and of the defendant, which, by contract, could not be sold or disposed of separately. They are sometimes referred to as "Chase units." These shares had been combined in 1917 and were at one time listed on the New York Stock Exchange but in January 1928 were delisted so that stock of the defendant securities corporation was not exempted by the terms of our securities act from registration here. Shortly after the delisting, defendant opened an office in Minneapolis and commenced the sale of the combined stocks. The sale to plaintiff was made by a duly authorized agent of defendant. The defendant was licensed as a corporation to do business in this state and had irrevocably appointed the commissioner of securities as its agent to receive service. After the crash of 1929 it withdrew from the state, at the same time appointing the secretary of state its agent to receive service in any action arising out of transactions which took place in this state while it was licensed to do [fol. 1820] business here.

The opinions of this court were filed on January 10, 1941, while the legislature was in session. In April of that year, by L. 1941, c. 547, § 18, the legislature for the first time enacted a specific limitation upon actions based upon un-

lawful sales of securities, or deceit in connection therewith, and fixed six years from the date of delivery of the securities as the time within which action for violation of the statute or deceit must be brought. This section of the statute reads as follows:

> "No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or nonregistration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date."

It is the proviso which presents what we regard as the controlling questions in this case. (1) Did the legislature intend by this proviso to lift the bar of the statute where the general six-year limitation had already run? (2) If it intended to lift the bar, did it have the constitutional power to do so? (3) If these two questions be answered in the affirmative, was it the intent to include actions already pending?

1. It is quite obvious that at the time the securities were sold they were required by our law to be registered. The fact that a share of bank stock immune from registration was inseparably joined with stock which was nonimmune from [fol. 1821] registration for sale and transfer purposes would not immunize the corporate stock required to be registered. No authority or logic is necessary to sustain that holding. But see Commr. of Banks v. Chase Securities Corp. 298 Mass. 285, 10 N. E. (2d) 472.

2. Since the stock was not registered the plaintiff is entitled to recover the purchase price unless barred by the

statute of limitations. Vercellini v. U. S. I. Realty Co. 158 Minn. 72, 196 N. W. 672. The action is in tort. Drees v. Minnesota Petroleum Co. 189 Minn. 608, 611, 250 N. W. 563, 565.

3. The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read "more than five years *and less than six years* shall have elapsed," etc.

The legislature acted promptly after our first opinion was filed. The inference is plain that it was dissatisfied with the law as laid down in that opinion and regarded it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute, as had been held in the federal court. City of New York v. Stern (8 Cir.) 110 F. (2d) 601.

That it had all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered. It was well known that a multitude of sales of this and other unregistered stock had been made in this state shortly before the 1929 crash. The evidence in this case shows about 500 sales of Chase units in Minnesota by this defendant in 1929. The legislature must have known that the great bulk of the [fol. 1822] violations of the statute had occurred prior to the crash and that few, if any, had occurred afterwards. As heretofore stated, defendant effected its withdrawal from the state in 1931. In the National City case (Pomeroy v. National City Co. 209 Minn. 155, 296 N. W. 513), the withdrawal was effected in 1934. If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any, cases. Causes of action for such violations were not distinguished from those in deceit which under the prior law may or may not have accrued more than six years prior to the effective date of the act. It is a rule of construction that provisos are limita-

tions rather than extensions of legislative provisions (Minn. St. 1941, § 645.19), but all rules must yield to obvious legislative purpose; and where, as here, that purpose is expressed in clear language without qualification and the circumstances under which the law was enacted support the indicated purpose, we look to the intent expressed even if it is in a proviso when it should have been expressed without the use of the word "provided." Legislatures have habitually ignored the appropriate limitations of provisos (even those which they have themselves prescribed) and have used them to extend the scope of acts. When their purpose is clear, we are bound to give effect to it. State ex rel. Town of Marine v. Browne, 56 Minn. 269, 273, 57 N. W. 659. We regard the proviso here under consideration as lifting the bar of the general six year limitation.

4. It is the contention of defendant that the lifting of the bar of the statute in this case is a violation of the due process clauses of the state and federal constitutions. The [fol. 1823] leading case cited by plaintiff in support of the legislature's constitutional power to lift the bar is Campbell v. Holt, 115 U. S. 620, in which the Supreme Court drew the distinction between two kinds of statutes of limitations, those that prescribe a limit of time within which adverse possession of property may be challenged and those where time merely bars the plaintiff's remedy if the defendant chooses to rely on the bar. In the first class of cases something more occurs than the mere passage of time. The adverse holder has possession and claims title adversely to the record owner and thereby creates a vested right in himself which after the lapse of the time fixed by statute cannot be taken away from him against his will without violation of due process.

In the second class of cases the passage of time creates no vested right in the exemption from the remedy. As said in Smart v. Baugh, 3 J. J. Mar. (Ky.) 364, cited with approval in Campbell v. Holt, *supra*:

> "* * * Time does not pay a debt, but time may vest a right of property. * * * The statute of limitations only disqualifies the plaintiff to recover his debt by suit, if the defendant rely on time in his plea. It is a personal privilege, accorded by law for the reasons of public expediency."

In Campbell v. Holt, the Supreme Court held that a statute which applied merely to the remedy did not vest such a right in the defendant that the legislature or, in that case, the constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

In Kipp v. Johnson, 31 Minn. 360, 363, 17 N. W. 957, 959, [fol. 1824] this court, speaking through Mr. Justice Mitchell, said, "No man has a vested right to a mere remedy, or in an exemption from it." In that case the distinction subsequently recognized in Campbell v. Holt was stated with approval. This court said (31 Minn. 362, 17 N. W. 958):

> "But what are often indiscriminately called statutes of limitation consist of two distinct classes: *First*, statutes of limitation, properly so called, where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but *extinguishes the right*, and vests a perfect title in the adverse holder. Stocker v. Berny, 1 Ld. Raym. 741; Leffingwell v. Warren, 2 Black, 599, 605; Buller, Nisi Prius, 103. The *second* class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of certain forms of action than a means of the acquisition of title. In such a case, the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property."

It is true that in Kipp v. Johnson the court considered that the plaintiff had another remedy that had not been barred by the statute which had been repealed, but we regard the court's statement of the law as quoted above as announcing the sound and logical rule even if there be no other remedy. In House v. Carr, 185 N. Y. 453, the court said:

> "It must be borne in mind that the Statute of Limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the legislature to repeal the

Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation."

We do not follow the logic of such cases as Eingartner v. Illinois Steel Co. 103 Wis. 373, 79 N. W. 433, and State v. C. & N. W. Ry. Co. 132 Wis. 345, 112 N. W. 515, or the Illinois cases which regard the running of the statute as paying the debt.

We have been cited to no case where we have drawn any distinction between our interpretation of the due process [fol. 1825] clause in our state constitution and the interpretation given to the due process clause of the federal constitution by the Supreme Court of the United States. We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court.

Statutes of limitation which only bar the recovery of a debt or damages for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of such statutes may be lifted without violating the due process clauses of either the state or federal constitutions. See also McEldowney v. Wyatt, 44 W. Va. 711, 45 L. R. A. 609; Orman v. Van Arsdell, 12 N. M. 344, 67 L. R. A. 438.

We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to this case.

The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, or the Federal Employers Liability Act, and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. G. N. Ry. Co., 92 Minn. 184, 99 N. W. 620; Kanellos v. G. N. Ry. Co., 151 Minn. 157, 186 N. W. 389; Danzer & Co., Inc. v. Gulf & S. I. R. Co., 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126.

5. Does the proviso apply to cases already pending? We think it does even though it was passed subsequent to a

determination by this court that the cause was barred. On this point we can do no better than to quote from Robinson v. Robins Dry Lock & Repair Co., 238 N. Y. 271, 281, 144 [fol. 1826] N. E. 579, 582; 36 A. L. R. 1310, 1315:

"* * * There is some conflict of decision in the various jurisdictions as to whether a case should be determined according to the law in effect when the judgment was rendered in the lower court or according to the law in effect at the time the cause was disposed of on appeal, but both reason and the weight of authority seem to point to the view that where a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment and pending appeal, the appellate court may dispose of the case in accordance with the law as changed by the statute. We have already pointed out that in the case of Danforth v. Groton Water Co. [178 Mass. 472, 86 A. S. R. 495, 59 N. E. 1033], the Massachusetts Supreme Court upon reargument reversed a judgment of the lower court which was correct when rendered because pending the appeal the bar of the earlier statute was repealed. 'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.' (U. S. v. Schooner Peggy, 1 Cranch, 103 [2 L. Ed. 49]. See, also, Dinsmore v. Southern Express Co., 183 U. S. 115 46 L. Ed. 111, 22 S. Ct. 45]; Un. Pac. R. R. v. Snow, 231 U. S. 204 [58 L. Ed. 184, 34 S. Ct. 104])."

Since the evidence is compelling that defendant sold plaintiff unregistered stock in violation of the statute, she is entitled to recover the purchase price.

Judgment affirmed.

Henry M. Gallagher, C. J.

[fol. 1826a-1835] [File endorsement omitted]

[fol. 1836] In Supreme Court of Minnesota

[Title omitted]

Petition for Rehearing—Filed Jan. 28, 1944

This Court held that a saving proviso in the limitations section of the 1941 Blue Sky Law revision was intended by the legislature to revive barred Blue Sky actions and claims and to reverse the rule of law settled by this Court on the prior appeal in this case and *Pomeroy* v. *National City Co.*, and that the legislature could not only constitutionally revive barred claims and actions, but also abrogate defendant's property rights vested by prior judgment of our highest Court of this state.

Error, as serious as any cited in *Derby* v. *Gallup* (1861), 5 Minn. 119 (Gil. 85 at p. 104), as proper ground for reargument, is found in this action of the Court in making unsupportable assumptions of legislative intent, in ignoring [fol. 1837] and brushing aside statutory and common law rules of construction and constitutional safeguards, in overlooking the proper position and meaning of the proviso in the section and as a part of the whole act of revision and in failing to recognize that its construction of the statute results in the statute itself being unconstitutional. A fundamental error in the decision is the fact that the Court failed to grasp the precise issue as to the 1941 law. The issue is *not*, as this Court repeatedly said in the opinion, whether the legislature intended and had the power generally to revive barred actions and claims by "lifting the bar" as to a remedy. *Rather, the only issue on the 1941 law is: whether the legislature, as to this plaintiff and on the basis of previous litigation in this case, intended to abrogate defendant's vested right adjudged in its favor upon the former appeal, and if so, whether the legislature had the constitutional power to do so.*

Error is undoubtedly attributable to the unusual manner in which the issue of the 1941 law first came into the case long after the close of the trial itself, the trial court's incidental and ambiguous decision on the issue, and the length and complexity of the other questions of fact and law presented by the voluminous record itself.

The trial of this case in May, 1939, consumed seven days. (R. p. 1128). The record is over 1,200 pages. The issues involved questions of Blue Sky violation, implied fraud, concealment, actual fraud, restitution, laches and delay, [fol. 1838] damages and numerous vigorously contested evidence questions, all in addition to the limitations issue which was the sole ground of decision on the first appeal. The 1941 Act of Revision was a later injection into the case, coming after this Court's decision on the limitations issue and before trial court findings were made on other issues (R. p. 1114). The inapplicability of the statute to the case was urged below, but the Court made an ambiguous finding: "In so far as the provisions" of the 1941 statute "are applicable to plaintiff's cause of action * * * the time for assertion thereof * * * was extended * * *" (R. p. 1157). It was but one paragraph among thirty pages of findings made against defendant on all issues.

Defendant moved for amended findings (R. p. 1173) or for a new trial (R. pp. 1195-1196) on the ground (a) that such finding was not justified by any evidence, (b) that it was contrary to law, (c) that, if construed to revive plaintiff's cause of action, the 1941 statute was unconstitutional as depriving defendant of property without due process of law, and (d) that the finding was vague and indefinite. The motions were both denied (R. p. 1218). This, among numerous others, was assigned as error on the second appeal to this Court (Appellant's Brief, pp. 34-36, and Apx. 28-29; Re-Brief, p. 10). Thus defendant protested the finding of revivor on insufficient record evidence, and was denied, by denial of its motion for new trial, the opportunity of introducing evidence to show that there were no circumstances [fol. 1839] under which the law was enacted indicating a legislative intent to revive barred claims and to nullify defendant's vested rights. The lower Court's error was perpetuated by this Court, which substituted assumption and surmise in place of real evidence of legislative intent.

The numerous and complicated questions of substance account for the fact that the 1941 statute did not have the important place in the briefs and arguments that it apparently should have had. It is, therefore, we submit a proper case for rehearing. In *Hammel* v. *Hill Lumber Co*, (1930),

182 Minn. 1, 232 N. W. 40, the Court, having granted reargument, said (p. 8):

> "* * * we were subject to the just criticism of deciding the case upon a point not made the chief one on appeal."

Moreover, the case is one of unusual public concern to all litigants since it holds the legislature may properly enact special legislation directed specifically against certain litigants, *i. e.*, the Chase Securities Corporation and the National City Company, in favor of other litigants, and that it has the constitutional power to abrogate rights vested in this defendant by the judgment of this Court, which was entered on March 7, 1941, reversing the orders and judgment of the Court below and adjudging that defendant have and recover $389.70 costs and disbursements. This declared principle is so far-reaching in effect that it commands general concern as to its implications. Such interest justifies [fol. 1840] "further consideration" on rehearing. *Hanford* v. *St. Paul, etc., Ry. Co.* (1889), 43 Minn. 104 at 110, 42 N. W. 596.

By every rule of law and ordinary justice, defendant should be allowed the right to reargue a case which, in dollars of liability and in legal principle, is of the utmost significance.

Defendant respectfully requests that this petition for rehearing be granted for the above general reasons and because this Court overlooked or ignored the following:

I. The finding of legislative intent *only* to revive barred claims and pending causes of action shows the Court's failure to consider the absence of an intent to abrogate defendant's vested rights in the prior judgment of this Court—which is the only intent material in this case.

II. In deciding that the legislature intended to revive barred claims generally, the Court failed to consider these factual and legal matters:

1. There is no record evidence to support such finding;

2. Defendant had no opportunity to submit evidence on legislative intent at the original trial (the law not being in existence then), and it was denied the right to

do so on its motion for a new trial. It is entitled to know the facts, if any, of which the lower Court (if it did) and this Court seemingly took judicial notice, and it is entitled to the opportunity to submit evidence to refute the erroneous assumption made. If this Court now refuses to afford defendant such opportunity (by [fol. 1841] remanding or referring the case for evidence on this issue), defendant will be denied a fair trial and due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States and Section 7 of Article 1 of the Constitution of this state;

3. The Court's assumption of intent, based on sources outside the record and unknown to defendant and not specified by either the trial court or this Court, is contrary to all obtainable and competent oral and documentary evidence which would show the true legislative intent—the intent of the Securities Commissioner who was the sponsor of the bill, the intent of the legislative committeemen who considered the bill, and its actual history in the legislature;

4. An intention to revive barred claims cannot be spelled out of an assumed dissatisfaction with the *Pomeroy* case which decided only the tolling question;

5. The finding is contrary to all reasonable interpretation and inferences from the clear language of the law and surrounding circumstances and to establish rules of statutory construction applicable thereto including rules adopted by the legislature at the same time that the limitations provision was enacted (Ch. 492, § 16, *Laws of Minn. 1941*).

III. The proviso could not apply to a case, such as this, which, though previously pending upon a statutory action, had been finally adjudicated and terminated as to such action when the law was enacted and defendant had vested [fol. 1842] rights under the judgment which could not be constitutionally abrogated by an act of the legislature, even under *Campbell v. Holt*.

IV. This Court misconstrued the nature of this action which was not one in tort, as presently held, but a statutory action, *i. e.*, one founded "upon a liability created by stat-

ute," as held upon the former appeals in these very cases. As such, it is not governed by the common-law action case of *Campbell v. Holt*, but by the statutory action rule of *Danzer v. Gulf & Ship Island Ry. Co.*, 268 U. S. 633, 69 L. Ed. 1126. The cases holding unconstitutional attempts to revive barred statutory actions do not, as erroneously stated by this Court, necessarily require that the limitations provision be found in the very statute creating the liability.

V. The section, as construed by this Court, is special legislation and invalid under Art. 4 §§ 33 and 34 of the Minnesota Constitution and § 1 of the 14th Amendment to the U. S. Constitution.

VI. If this Court's construction be correct, the title to the Act is misleading, and the section is invalid under Art. 4, § 27, of the Minnesota Constitution requiring that "No law shall embrace more than one subject which shall be expressed in its title." Here the title reference to § 18, Ch. 547, Laws, 1941, is merely "fixing a limitation of actions," and the title's failure to mention "revival of barred actions" is a fatal defect.

[fol. 1843]

I

The Court's Finding of Legislative Intent Shows Failure to Consider Absence of Vital Intent to Abrogate Defendant's Vested Rights in Prior Judgment of This Court

This Court would have it appear, from the opinion: that the legislature, which met on January 7, 1941, was advised of the *Donaldson* and *Pomeroy* decisions (filed January 10, 1941), "promptly" set about correcting the situation and enacted § 18; that it was "dissatisfied with the law as laid down in that opinion . . . ." as "unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute"; that it "can hardly be questioned" that the legislature "had all the cases similar to that at bar in mind"; that the "legislature must have known that the great bulk of the violations of the statute had occurred prior to the crash and that few, if any, occurred afterwards"; that the defendant and National City withdrew from Minnesota in 1931 and 1934, respectively;

and that if defendant's construction of the proviso were applied, it (the proviso) "would apply to few, if any, cases"; that the word "provided" should not have been used in the section and that legislatures "habitually ignore" limitations of provisos. In other words, says the opinion, [fol. 1844] if it didn't apply to Chase Securities Corporation and National City Company, there couldn't be much else for it to apply to, so it must be assumed that the legislature singled out these corporations for special consideration and reversed the law holding Blue Sky actions barred.

As already pointed out, the Court failed to make a vital finding of legislative intent to abrogate and nullify rights of litigants, including this defendant, which had already become fixed and vested prior to the passage of the 1941 statute. This is the only real issue on the matter of legislative intent, involved in this case. What the legislature may have intended to do by way of changing the law, established by this Court on the prior appeal as to unlitigated or pending claims or suits, which is the essence of the intent found in paragraph No. 3 of the opinion, is here wholly immaterial.

The Court's finding of an *immaterial* intent and its failure to consider and determine a material intent, namely, that the legislature intended to set aside the judgment in this very case, shows, at the outset, that the issue was not clearly in the mind of this Court, and that reargument and reconsideration are necessary to a correct final determination.

If the legislature did not have the intent to abrogate defendant's rights vested by the prior judgment of this Court (which we submit is the only proper conclusion), the Court's decision in this case is plainly erroneous on that ground alone. No legislative act can be held to accomplish a cer- [fol. 1845] tain result unless it is *first* found that the enacting body had such an intent. The existence of constitutional power to do so is always a *second* question to be considered only if intent is found *first*. *Kannellos v. Great Northern Ry. Co.* (1922), 151 Minn. 157, 186 N. W. 389; *Helvering v. Griffiths* (1942), 318 U. S. 371, 63 S. Ct. 636.

We later show (see p. 42, *infra*) that even if the Court should now amend its opinion to find such specific legislative intent, the application of such an act to defendant in this case would result in denial of due process of law, under the "vested rights" principle stated in *Campbell v. Holt*—the very case which this Court here says should be binding upon it.

II

The Court's Finding of Legislative Intent to Revive Barred Claims Generally Is Based on Erroneous Assumptions, as to Which Defendant Has Been Denied Right to Submit Proof

Even if the intent to revive unlitigated claims and pending actions could be considered material in this case, we submit that it is entirely unsustained by the record facts and is contrary to facts which can be judicially noted and facts which defendant has, no yet had the opportunity to prove in this case, within its constitutional guarantee of due process of law.

The determination of legislative intent is often said to be [fol. 1846] a question of law for the Court to determine. However, it is sometimes necessary for the Court to go outside the words used to determine legislative purpose by reference to facts. This is what the Court found it necessary to do in the case at bar. Where a Court does undertake to determine such underlying questions of fact, the parties should be afforded an opportunity of bringing facts to the Court's attention in order that the Court's findings be not based on conjecture and surmise. It is analogous to the situation where constitutionality of a law is challenged on the ground that it is an arbitrary and unreasonable exercise of the police power. In such situation it is held proper for the Court to determine as an issue of fact whether the law will attain a beneficial public object, *Gunderson v. Anderson* (1933), 190 Minn. 245, 251 N. W. 515; *City of St. Paul v. Clark* (1935), 194 Minn. 183, 259 N. W. 284; see Henry Wolf Bikle "Questions of Fact Affecting Constitutionality," 38 *Harvard Law Review* 6; 1 *Wigmore on Evidence* (3rd ed.), Sec. 4 (1), pp. 145-146; 9 *Wigmore* (3rd ed.), Sec. 2555, pp. 521-522. As a matter of ordinary reason and policy, we believe that the Court, here having shown its desire to consider the facts on the issue of legislative intent, should welcome the opportunity to receive competent proof on that issue, to the end that its ultimate decision will rest on the true facts and not on unsupported surmise.

[fol. 1847] 1. There is no evidence of record to support such finding

At the trial of the case in 1939, the matter of applicability of the 1941 law was not in issue since the law did not then

exist. Consequently, the record is necessarily without any evidence bearing specifically on the question either way, and this Court attempted to overcome this circumstance by citing only that defendant made about 500 sales of Chase units in 1929; and that it withdrew from Minnesota in 1931 and the National City Company in 1934. That is all. The finding of legislative intent to revive cannot be sustained by these meager record facts. The Court concedes as much because the opinion assumes the existence of other matters wholly outside the record, for which there can be no possible justification except upon the theory of judicial notice.

2. Defendant has not yet had the opportunity to submit proof on legislative intent; unless this right is now granted, it will be denied due process of law under the United States Supreme Court case of Ohio Bell Telephone Co. v. Public Service Commission

While we do not say that this Court may not consider matters which are the proper subject of judicial notice, we submit that this Court completely overlooked two basic considerations in this case: that defendant has not yet had [fol. 1848] the opportunity to offer proof to the trial court or to this Court on the issue of legislative intent, and that if such opportunity is not given to it somewhere in the course of these proceedings, it will be denied a fair trial and due process of law under the rule that the taking of judicial notice can not prevent the opponent from disputing the matter by evidence.

The record shows that defendant has not yet had an opportunity to offer evidence on the question of legislative intent. When the case was tried in 1939 the law did not exist. Defendant moved for a new trial below on the issue of the applicability of the 1941 statute, assigning among other grounds that there was no evidence to support the Court's finding, ambiguous in character,[1] that the statute revived the barred action. The motion was denied. This error on the part of the trial Court was assigned here (*ante*, pp. 3-4).

[1] We stress the ambiguity of the lower Court's finding, "In so far as the provisions" of the 1941 statute "are applicable * * *," etc., because it shows doubt in the mind of the Court as to whether the statute did apply.

We submit that the Court should reverse and direct a new trial with respect to the issue of legislative intention. Possibly, there may be some more feasible way of determining the fact questions which are present in ascertaining intent. Possibly the Court may find it more practical to refer the question to a referee.[2] Whatever practical means may be considered best to secure the evidence, we wish the opportunity of presenting facts on this issue. We make what is [fol. 1849] in nature an offer of proof relative to legislative intent. We do not say that the offer is complete or that there may not be facts to the contrary developed by our opponents on a hearing. All that we ask is an opportunity to be heard with respect to the facts and an opportunity to refute the assumptions of fact and conjecture about legislative intent in which this Court indulged.

If such opportunity is not afforded defendant by this Court in one of these ways, defendant will be denied due process of law, under the case of *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. There, the Public Utilities Commission of Ohio decided an important rate matter by taking judicial notice of price trends which were not matters of record in the hearing. The Commission denied the telephone company the right to be heard on the issue when it applied for rehearing and the Ohio Supreme Court, on appeal, upheld the Commission's action on the ground that matters of judicial notice could not be controverted. On appeal to the United States Supreme Court, the Ohio Court was reversed on the ground that defendant had been denied a fair hearing, resulting in a deprivation of due process guaranteed by the 14th Amendment. The Supreme Court (per Cardozo, J.) said:

> "Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions; the Commission reporting its conclusion, but not [fol. 1850] the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

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[2] See *Wigmore's* comments on this type of question in footnote No. 5, *infra*, pp. 18-19).

"An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice.

. . . . . .

"Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. *Wigmore, Evidence*, § 2567; 1 *Greenleaf, Evidence*, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'

. . . . . .

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here.

. . . . . .

"What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a [fol. 1851] secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"

The *Ohio Bell Telephone* case was followed in *In re Bowling Green Milling Co.* (C. C. A. 6th, 1942), 132 F. (2d) 279, where it was held improper for the District Court to take judicial notice of a trade custom, the existence of which was controverted by one of the parties in his brief alone on the appeal. In *State ex rel. Remick v. Clousing* (1939),

205 Minn. 296, 285 N. W. 707, 287 N. W. 13, this Court has held it improper for the trial Court in sustaining a demurrer to an answer to take judicial notice of facts contrary to the facts alleged in the answer. The rule that an opponent has the right to produce evidence to dispute matters of judicial notice has been recognized by Wigmore for years. See, 5 *Wigmore on Evidence* (2d ed.), Sec. 2567, p. 570. It is re-affirmed in 9 *Wigmore on Evidence* (3rd ed.), Sec. 2567, p. 535.

The circumstances of the case at bar make the reasoning of the United States Supreme Court singularly applicable. Here, this Court has taken judicial notice of facts unknown to defendant, has made assumptions of fact by no means conceded, contrary to all facts which we have been able to discover as we shall show, and has used such assumptions to impose liability on defendant. *Not once* has defendant had an opportunity to examine such "facts" as the Court indicates exist; *not once* has defendant had the slightest chance to submit its proof on the question here decided [fol. 1852] upon those unknown "facts." Unless that opportunity is given now by this Court, law and fair play will have been violated.

To comply with the due process clause this Court should reverse the trial court on one of the errors assigned, namely, that the trial court erred in overruling defendant's motion for amended findings or for a new trial on the ground that the Court's finding that the 1941 statute applied was unsupported by evidence (R. pp. 1173, 1195-6). Moreover, this Court has the power, and this is a proper case for its exercise, to remand the case to the lower Court to receive evidence on this single issue.[3]

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[3] The Supreme Court may grant a new trial with respect to part of the issues in a cause, 1 Dunnell, Minn. Dig., Section 439, pages 273-274; Brodsky v. Brodsky (1925), 164 Minn. 102, 204 N. W. 915; Child v. Mastin (1925), 164 Minn. 217, 204 N. W. 947. It may direct the trial court to hear additional evidence, after remand, on a particular issue. Farmers Bank of Dunn County v. Woolery (1923), 156 Minn. 193, 200, 194 N. W. 759. It has reversed on appeal from an order denying a motion for a new trial with directions to the trial court to decide the meaning of words in a contract as a matter of fact to be determined in the record; not as a matter of law, and to make findings as to such mean-

[fol. 1853] 3. The Court's assumption of legislative intent is contrary to facts, which can be judicially noted or are provable.

Within the rule of the above decision, we call attention to these significant facts which are notorious or are matters of public and official records of which this Court may take

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ing, Foltmer v. First Methodist Episcopal Church (1914), 127 Minn. 129, 148 N. W. 1077. It has modified an order for judgment with direction to the trial court to retain jurisdiction for a supplemental complaint and hearing. Selover v. Isle Harbor Land Co. (1904), 91 Minn. 451, 460, 98 N. W. 344. In a case of public importance, the Court granted a new trial where tried below on an erroneous theory. County of St. Louis v. Magie (1936), 198 Minn. 127, 269 N. W. 105.

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[1] It is well settled that this Court, in determining legislative intent, may and should take judicial notice of the reports of legislative committees which deliberated upon a proposed bill and the references thereto contained in the Journals of the House and Senate. Barlau v. Minneapolis-Moline Power Implement Co. (1943), 214 Minn. 564, at 574-6, 9 N. W. (2d) 6. In the footnote at pages 575-6 of the Barlau opinion, this Court approved several cases of the United States Supreme Court, including Helvering v. Griffiths, 318 U. S. 371, 63 Sup. Ct. 636, United States v. Wrightwood Dairy Co., 315 U. S. 110, 86 L. Ed. 726, and United States v. Dickerson, 310 U. S. 554, 84 L. Ed. 1356, which took judicial notice of what was said by the proponents of a bill in Congressional records and reports and in debates and explanations given orally in Congress. The latter case concluded that the Court may refer to "everything from which aid can be derived." This Court long ago said that it will take judicial notice of "all facts relevant to the question" and that courts may resort "to any means they may deem safe and proper." State v. Stearns (1898), 72 Minn. 200, at 219, 75 N. W. 210; State v. Bridgeman & Russell Co. (1912), 117 Minn. 186, 134 N. W. 496. In Crowell v. Lambert (1878), 9 Minn. (Gil.) 267, 276, the Court referred to debates of delegates to one of the Constitutional Conventions in determining the intention of a provision of the State Constitution. The Crowell case was cited for a

judicial notice,[4] and other matters which we offer to prove by documents and oral testimony[5]:

[fol. 1854] —the statutory setting of Section 18 in the general revision of the Blue Sky Law in 1941,
—the intention of the Commissioner of Securities who initiated and sponsored the bill in the legislature.
—the legislative history of the act, and
—the intention of the legislative commiteemen who most considered the bill and sponsored it,

all of which completely negative, we believe, any intention of the legislature to revive barred claims, but rather, to the exact opposite, show that the legislature intended to broaden the bar of the statute for the benefit of security dealers and, by the proviso, to give claims not then barred one year within which they could be sued.

Our recitation of facts not of record and of which we cannot ask the Court to take judicial notice is, therefore, a statement of what we are prepared to prove given the opportunity to rebut this Court's erroneous finding of factual matter in its determination of legislative intent. It is in the nature of an offer of proof substantiated by the affidavits presented with this Petition.

Statutory Setting

In seeking the intent of the legislature, § 18, Ch. 547, Laws of 1941, and the proviso should be considered first in its

similar purpose in Enger v. Holm (1942), 213 Minn. 154, 6 N. W. (2d) 101. Any indication to the contrary in Bragg v. Chicago, Milwaukee & St. Paul Ry. Co. (1900), 81 Minn. 130, 133, 83 N. W. 511; would appear to have been overruled in effect by the Bralau case and cases therein approved as well as by numerous other more recent decisions. Christgau v. Woodlawn Cemetery Ass'n (1940), 208 Minn. 263, 293 N. W. 619; see Higgins v. LaCroix (1912), 119 Minn. 145, 149, 137 N. W. 417.

[5] The problem of bringing such proof before the appellate court is considered by Mr. Wigmore in 1 Wigmore on Evidence (3rd Ed.), Sec. 4 (1), pp. 145-146. He points out that appellate courts are frequently called upon to determine genuine questions of fact, as for example, public policy and the social effects of legislation.

statutory setting. So far as appears from anything in the [fol. 1855] opinion, § 18 stood alone. However, the revision made a wide variety of changes, both of a major and of a minor nature, in about one-half of the operative sections of the old Blue Sky Law, repealed three sections thereof, and added more than a dozen new paragraphs and sections. We shall not detail all changes; rather, we urge the Court to scan the Act as found in the 1941 *Session Laws*, p. 1093. The italicized language will quickly show the additions and the broad scope of the revision. For example, provisions exempting insurance and banking company shares on certain conditions were added; provision was made for restricted and unlimited registrations; new provisions were added for automatic appointment of agent for service of process by the mere violation of the law; new filing fees were provided; penalties were stiffened; limitation provisions were added; and Investment Advisers were subjected to the law. It is apparent from the nature and extent of the changes made that the legislature was concerned only with the general improvement of the securities law as a matter of broad public policy and was not concerned with the defendant and the National City Company.

When the limitations section is considered in relation to the whole Act and the Act's legislative history, which we shall outline, the imputation of a legislative intention to reverse the *Donaldson* and *Pomeroy* cases cannot be justified.

[fol. 1856] The Commissioner of Securities who initiated and sponsored the bill had no intent to revive barred actions, and the original draft of the bill negatives such intent.

As early as 1939, the Commissioner of Securities, Robert L. Smith, Jr. (whose affidavit is filed with this Petition, a copy of which appears in the Appendix as Exhibit A), and his office considered the desirability of various amendments to the Blue Sky Law. In his official annual report to the Governor,[6] dated October 31, 1939, the Commissioner states:

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[6] Section 3996-20 of the Blue Sky Law makes it the duty of the Securities Commission annually, on or before November 1st of each year to file in the office of the Governor a report for the fiscal year ending June 30th containing

"There appears to be some need for some revision of the present Act and careful study is being made as to possible recommendations for amendments for consideration of the 1941 legislature."

In his like report, dated October 31, 1940, he says:

"Considerable work has been done in the past year in formulating amendments to our securities law. These amendments will be submitted to the 1941 legislature."

The following are the words of the Commissioner as they [fol. 1857] appear in his affidavit:

As early as 1939, he and his office thought it desirable to submit to the 1941 session of the state legislature various amendments to the securities law.

Among the various steps in the consideration and preparation of such amendments during the year 1940, he had conferences with the local legislative committee of the Investment Bankers Association and their counsel concerning various revisions. One of the matters discussed specifically with them was the need for a limitations statute as to transactions pertaining to the sale of securities, so that licensed dealers and brokers could carry on their business without the fear of lawsuits for an unlimited period thereafter. As a result of these conferences, such counsel prepared a preliminary draft December 20, 1940, and submitted it to affiant. It contained the following limitations provision:

"3996-24 * [Nothing in this act shall limit statutory or common law right of any person to bring action in

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schedules of all applications received, granted or denied, of all registrations and licenses suspended, revoked or cancelled and such other information as the Commission considers material. Courts may take judicial notice of official reports and letters of a department of government. Jones v. United States, 137 U. S. 202, 34 L. Ed. 691, at 697; Heath v. Wallace, 137 U. S. 573, 34 L. Ed. 1063, at 1068; Temple v. United States, 248 U. S. 123, 63 L. Ed. 162. See, also, numerous to same effect in 31 C. J. S., Secs. 42 and 43, pp. 606-610.

* Struck out in copy.

any court for any act involved in the sale of securities, or the right of the state to punish any person for any violation of any law.] *No action shall be maintained for relief upon a sale of securities made in violation of or noncompliance with any of the provisions of this Act, or upon a sale of securities made in violation of or noncompliance with any of the terms or conditions of a registration thereof under this Act, or for failure to disclose that the sale thereof was made in violation of or noncompliance with any of the provisions of this Act or in violation of or non-compliance with any of* [fol. 1858] *the terms or conditions of a registration thereof under this Act, unless commenced within three (3) years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this Section, more than two years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date, and provided further that no purchaser of a security otherwise entitled thereto shall bring an action for relief of the character above set forth who shall have refused or failed to accept, within thirty days after delivery, a written offer delivered to him from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of payment to the date of repayment, such interest to be computed at the same rate as fixed interest or dividend rate, if any, provided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser of such securities. Such written offer so delivered to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commission prior to delivery thereof.*

The time for the commencement of any action specified in this Section shall be extended by reason of any fact specified by the Statutes of this State as now in effect or as hereafter amended as reasons for the extension of the time for the commencement of actions.

and for the time specified therein, provided, neverthe-
[fol. 1859] *less, that no person who has filed with the Commissioner of Securities or with the Secretary of State of this State an appointment of agent for the service of process, upon which agent valid service in any such action can be made, shall be deemed to be out of the State so long as such appointment is in effect.*

Nothing in this Section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the State to punish any person for any violation of law."

The preliminary draft was studied and was changed substantially, including the lengthening of the limitations period to six years, before introduction as a bill in the legislature.

He was aware of the claim of implied fraud made in pending Blue Sky litigation and was concerned about the possible continued indefinite liability of sellers because it would tend to drive out of the investment business responsible business men to the ultimate disadvantage of the investing public. In order to permit all purchasers of securities, however, ample opportunity to assert just claims under the Blue Sky Law, he recommended that a six year period be provided, rather than the one to three year periods specified in the great majority of analogous state statutes.

He appeared before the Judiciary Committee and its Subcommittee of the House and explained the various proposed revisions, including the limitations section.

[fol. 1860] He knew of the many pending suits against National City Company and Chase Securities Corporation, including the *Pomeroy* and *Donaldson* cases; that in the consideration of a limitations statute covering claims growing directly or indirectly out of violations of the Blue Sky Law, the question of lifting the bar as to any cause of action already barred under the then law against any seller of securities was not contemplated by affiant, and he does not recall that anyone else in his department or in the legislature raised the question or expressed a desire that the proposed amendment should be drawn to lift the bar as to any outlawed claims or suits; that it was the purpose of himself and of his office that the limitations section limit

the time within which suits could be brought to a reasonable period.

After the decisions of the Supreme Court in the cases of *Pomeroy v. National City Company*, or *Donaldson v. Chase Securities Corporation*, of January 10, 1941, no mention was made by anyone connected with the proposed revisions, so far as he can recall, either in his office, in the legislature or anywhere else, as to any desire or intention to enact a statute which would have the effect of reopening claims or actions already outlawed, or which would change the statement of law just decided by the Supreme Court.

At no time did he, nor to his knowledge anyone in his department, express to anyone any views or opinions about the purpose of the limitations section which were inconsistent with the foregoing.

[fol. 1861] As stated above, the Commissioner received preliminary drafts about December 20, 1940, or *3 weeks prior to the filing of the decisions of this Court, on January 10, 1941, in the Donaldson and Pomeroy cases, which drafts contained a limitations section substantially the same as contained in the bill submitted to the legislature and the Act as finally enacted except for the following variations:*

(a) The draft provided for 3 and 2 years instead of 6 and 5 years, respectively, as found in the Act as adopted.

(b) The draft while containing the language "No action shall be maintained * * * for failure to disclose that the sale * * * was made in violation" of the Act, did not contain the language, found in the Act as adopted, "or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale."

(c) *The all-important saving proviso was the same except only that it provided for 2 years in place of the 5 years found in the Act as adopted.*

(d) There was included in the draft an additional paragraph, not to be found in the typewritten copy of the Act submitted to the legislature, providing, in effect, that the limitations time should not be extended (tolled) where an agent to accept process had been appointed.

It appears, therefore, that at least 3 weeks prior to this Court's decision a draft of the proposed section and the proviso the same (so far as the question here presented is concerned) as that contained in the bill submitted to the [fol. 1862] legislature and finally adopted, was being considered by the proponents of the bill. Can it still be said that the legislature, which adopted the language of the draft, prepared before knowledge of the Court's decisions, was moving "promptly" to undo those decisions? Can it be said that the proponents and draftsmen intended to reverse decisions not yet rendered; or that they had prophetic knowledge of such decisions? We believe not.

Moreover, we point out that in his official report for 1940-41, dated October 31, 1941, the Commissioner makes no reference to the limitations provision, but calls attention to the 1941 amendments as requiring investment advisers to be licensed and subjecting them to similar requirements as investment dealers and brokers, as providing more drastic penalties for violations, and as inserting more modern provisions to expedite the business of legitimate licensed dealers. If he had thought that the Act had revived all Blue Sky claims for violation since 1917 it is reasonable to suppose that he would at least have mentioned that important result.

The Legislative History of the Bill Shows no Such Intent

In typewritten form the bill was introduced into the House on March 20, 1931, as House File (H. F.) 1265, by two members of the Judiciary (one of whom was Mr. Fred [fol. 1863] P. Memmer, whose affidavit is presented herewith), two of the Banking and one of the Insurance Committees; was read once and referred to the Judiciary Committee (*House Journal* 824).[7] It was sponsored by the Commissioner of Securities and was therefore a so-called administration bill. (Mr. Memmer's affidavit.)

On March 27, 1941, the Judiciary Committee considered

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[7] The Court may take judicial notice of the House and Senate Journals (see cases in footnote 4, *ante*), and under §9853, Mason's Minn. Stats. 1927, may receive the same in evidence.

the bill (Judiciary Committee Record Book, p. 73.[8] The minutes of that meeting show that Commissioner Smith appeared and explained the bill generally and some of the 27 sections in particular; *e. g.*, he explained the new matter in Section 4, providing for two new types of registration, restricted and unlimited. He also explained that Section 22 (Application of the Act) carried forward the interpretation that was presently placed upon the Blue Sky Law, but was desirable for purpose of clarity. Motions were passed to amend Sections 2 (securities exempted), 3 (sales excepted), 4 (securities registered before sale), 5 (registration by application), 8 (information to Commissioner by registrants) and 12 (examinations). A subcommittee was appointed to consider the bill further, consisting of Messrs. Lenertz, [fol. 1864] Chairman, Allen, Memmer, Hagen, G and MacKinnon. The minutes, signed by Mr. MacKinnon, Chairman, and Mr. Gordon Wright, Clerk, found in the *Judiciary Committee Record Book* (p. 75) show no mention of Section 18 of the bill (limitations), and *there is therefore no affirmative evidence of any intention on the part of the Judiciary Committee to revive barred claims.* Mr. Memmer points out in his affidavit, but the Court can note judicially, the legislative practice of appointing to the Judiciary Committees (unless they decline) all House and Senate members who are lawyers. It is fair, therefore, to assume knowledge on the part of the members of limitations provisions generally, the drastic nature of revivor statutes and questions of constitutionality involved.

The subcommittee's report was made the following day (*Judiciary Committee Record Book*, p. 180) and is signed by Messrs. Lenertz, Huhtala, Hagen, Kiefer and MacKinnon. Messrs. Allen and Memmer were named but did not sign the report. Messrs. Huhtala and Kiefer, not named, did sign. Absent record information, we can safely assume that the former could not serve, and that the latter were in-

[8] Permanent Rule 6 of the House requires the Chairman of each committee to keep a record of meetings. Minutes of the meetings in typewritten form are pasted in a large book which is kept as a permanent legislative record in the Secretary of State's office open to public inspection. This Court may take judicial notice of the same. See cases in footnote 4, ante.

formally substituted. The report recited that they had considered the remaining sections; that Commissioner Smith and Deputy Commissioner Hayes had appeared and further explained the bill and that the sections considered were in proper form and recommended the same for passage except for an immaterial change in Section 25 (laws repealed). *Here, also; there is no mention of Section 18 and* [fol. 1865] *no affirmative evidence of any intention to revive barred claims.*

On the same day (March 28, 1941) the Judiciary Committee again considered the bill and the above report (*Ib.*, p. 75) Mr. Lenertz reported that the subcommittee had considered H. F. 1265 and that changes in the law had been studied and recommended changes in Section 12 (dealing with examinations) and Section 25 (laws repealed). Motion was passed to amend the bill to conform to the report and to recommend its passage. *There is no mention of Section 18 and no affirmative evidence of an intention to revive barred claims.*

On March 29, 1941 (*House Journal*, p. 1021), Chairman MacKinnon reported the typewritten bill to the House with numerous amendments (covering two full pages of the legislative journal), none of which concerned Section 18 (limitations) except the insertion of the word "hereby" between the words "is amended." These amendments, which we shall not describe in detail, but which we recommend that this Court consider by examining pages 1021-3 of the *House Journal*, do show beyond doubt that the entire bill was given careful consideration, section by section. Mr. MacKinnon recommended that with the amendments the bill pass. Such recommendation was adopted (*Ib.*, p. 1023). On the same day the bill was read the second time (*Ib.*, p. 1024).

On the next but last day of the session, April 22nd, the bill was considered again, having been made the subject of [fol. 1866] a special order for a day certain (*Ib.*, pp. 1515, 1621-2, 1746). Mr. MacKinnon and Mr. Lenertz moved amendments to three sections (Section 18 not being among them) which were adopted (*Ib.*, p. 1831). The bill was then given its third reading and passed, yeas 69 and nays 9 (*Ib.*, p. 1832).

On April 23 the bill, with numerous others, went to the Senate (*Senate Journal*, pp. 1469-70). It was read for the first and laid on the table (*Ib.*, pp. 1482-3). On the same

day it was taken from the table; the rules were suspended; it was read the second and third time and adopted, yeas 44, nays 2 (*Ib.*, pp. 1692-3). This was the final day of the session when as is common knowledge, the "clock was turned back" and a great mass of legislation was undoubtedly jammed through without debate. Consideration of the bill in the Senate must have been scant. But, as stated above, and, as the vote both in the House and Senate indicates, it was an administration bill. It was signed by the Governor, with other bills, on April 28, 1941.

Members of the House Judiciary Committee Had No Such Intent

Of those who signed the subcommittee report, mentioned above, only Mr. Huhtala could be reached up to the date of this Petition for interview. Mr. Fred P. Memmer (whose affidavit is filed herewith, Exhibit C annexed hereto) states on information and belief, that: Mr. Lenertz is with the [fol.1867] Federal Bureau of Investigation; Mr. Hagen is in the Army, and Mr. MacKinnon is in the Navy; Mr. Kiefer has died.

Mr. Huhtala, one of the members who signed the subcommittee's report to the House Judiciary Committee, states positively that the subcommittee, in accordance with its practice, read word for word each section of the bill and that neither in the subcommittee's consideration of the whole or any part thereof, particularly Section 18, relating to limitations, was any consideration or discussion given to the *Donaldson* and *Pomeroy* decisions. What the subcommittee and the Judiciary Committee had in mind was that persons, who had existing claims not barred by limitations at the time the bill was passed, should be given one more full year within which to sue. Mr. Huhtala did not intend, and so far as he can tell from anything that was said, no other committeemen he knew of intended to revive claims barred by the ordinary six year statute of limitations. So far as Mr. Huhtala can recall, the legislature itself gave no discussion to or consideration of the *Pomeroy* and *Donaldson* decisions in the consideration and passage of the bill. The only thing he can recall mentioned was that if a claimant had only a month or so to go before his claim was outlawed, he ought to have the longer time of a full year in which to start suit.

Mr. Fred P. Memmer was one of the five sponsors of the bill in the House (*House Journal*, p. 824). He states:

The bill was referred to the Judiciary Committee of [fol. 1868] which he was a member and was discussed at a meeting thereof which he attended. Commissioner of Securities Smith appeared at the meeting and explained all of the provisions of the bill, including Section 18 (limitations). In the discussion of the bill no mention was made of *Pomeroy* and *Donaldson* decisions. At no time was it mentioned that Section 18 or any provision therein was intended to change the law as laid down by the Supreme Court in said cases nor was it mentioned that Section 18 or any provision thereof was drafted for the purpose of reviving any action or claim which the Supreme Court had held barred under existing law. No mention was made of the name of any party or persons intended to be affected by the bill when it was discussed in the committee.

Before the bill was introduced in the House, he discussed the measure generally with the Commissioner of Securities, but he does not recall any of the particulars of that discussion except that he sought and obtained a general idea of what the bill was about.

He does not recall attending any meeting of a subcommittee which considered the bill. Normally, there would be no debate of a bill on its first reading. It is merely sent to committee. He does not recall that there was any debate on the floor of the House when the bill was reported back by the Judiciary Committee and placed upon General Order before its second reading. He does not recall that there was any debate or discussion about the measure when it [fol. 1869] came up for a third reading. The bill was an administrative measure, extensive and complex in its terms, and he believes that there would have been very little discussion on the floor of the House but that almost all discussion would take place in the Judiciary Committee which is made up entirely of lawyers.

No record of discussion or debate in the House or Senate is required to be, or is kept. The third reading and passage of the bill in the House occurred on the next to the last day of the session, when, as the *House Journal* will show (pages 1803 to 1885) an enormous amount of legislative business

was transacted. It is unlikely that there was any time for, or, since it was an administration bill, any interest in debate. The same can be said concerning action in the Senate when, as stated above, the first, second and third readings and passage occurred on the last day.

It is a fair inference from the factual matter which we have offered that revival of barred actions, of the magnitude claimed by this Court, would be considered an important matter and as such would receive specific attention and at least some mention either on or off the official records. And yet there is not one word which we have been able to find on or off the records, showing mention or indicating discussion or consideration of the question of revivor.

[fol. 1870] In refutation of the Court's assumptions, the facts offered show that neither the Commissioner, who was the administration sponsor of the bill, nor the House sponsor, Mr. Memmer, nor the Judiciary Committeemen, as far as we have been able to discover, so much as mentioned the subject of revivor. And if revivor was not mentioned or considered by the persons closest to the bill, it does violence to the facts to assume, that there was an intent to effect a revivor. Particularly is this so where the legislature passed the bill quickly in the closing days of the session, as an administration bill, and obviously relied on the word of the sponsors and the House Judiciary Committee.

4. Intention to revive barred claims cannot be spelled out of an assumed dissatisfaction with the decision on tolling.

A further word concerning this Court's statement that

> "The inference is plain that it (the legislature) was dissatisfied with the law as laid down in that opinion and regarded it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action *which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute as had been held in the federal court.*"

If assumptions of fact are to be indulged, we raise this question: If the legislature were dissatisfied with this Court's decision that limitations were not tolled by absence [fol. 1871] from the state, where the Commissioner was at

all times the agent for service of process, why did not the legislature, in 1941, *when revising the very Blue Sky section (§11, Agents for service of Process) providing for the appointment of the Commissioner as a prerequisite to obtaining a license*, limit the effect to be given such appointment so as to allow tolling on withdrawal, instead of leaving the matter for obscure inference from the proviso clause in Section 18 which has nothing in it concerning or suggestive of tolling? Moreover, it would have been easy enough to revise §9200, *Mason's Minn. Stats. 1927*, dealing with "Effect of Absence from State" which section was the principal subject of this Court's decision on the former appeals.

Had the proponents of the bill or the legislature intended to change "the law" of the *Pomeroy* case, it is a "reasonable inference" and a "logical deduction" (to use the words of this Court in that case) that they would have done so by changing the tolling statute which was the basis of "the law" in that case. To suggest that the legislature intended to reach this result by inference from the ambiguous language in §18 is to indulge in the "guess or conjecture" which this Court, on the prior appeal in this case, so recently condemned as unsound "material for decision."

[fol. 1872] 5. The clear language of the statute, the circumstances surrounding its enactment and settled rules of construction negative such legislative intent; the Court's finding is the result of conjecture and not reasonable inference.

Another fallacy in the Court's assumption of legislative intent is embodied in the language of the opinion, that the legislature "must have known that the great bulk of the violations of the statute had occurred prior to the crash and few, if any had occurred afterwards," that Chase withdrew in 1931 and National City in 1934 and finally "if the clause * * * were to be interpreted as defendant contends, *it would apply to few, if any, cases.*" In other words, if it didn't apply to Chase and National City it couldn't apply to anyone and was meaningless.

This Court could not assume that there were no pending claims to which the proviso could apply except those against these defendants and that therefore the proviso would be meaningless unless applied to sales made by them in 1929. Apart from what must be apparent as a matter of common

knowledge, the 1941 revision alone will show that the sale of securities in Minnesota did not end with the 1929 crash or the withdrawal of Chase Securities Corporation and National City Co. from Minnesota. Otherwise, what need was there for continued protection against non-registration and a careful revision of Blue Sky requirements? If other evidence be needed, this Court should take judicial notice of [fol. 1873] the fact that the official reports of the Commissioner of Securities to the Governor[9] show the granting of the following Blue Sky licenses to brokers and dealers in Minnesota:

Fiscal Year	*Licenses Granted*	*Fiscal Year*	*Licenses Granted*
1929-30	241	1935-36	130
1930-31	246	1936-37	149
1931-32	195	1937-38	128
1932-33	305	1938-39	114
1933-34	154	1939-40	107
1934-35	141	1940-41	96

These same reports show that between the years 1929-30 and 1940-41 there were 32 suspensions of brokers' and dealers' licenses, presumably for failure to adhere to the requirements of the Blue Sky Law.

It is particularly significant to note that in his annual report, dated October 31, 1941, covering the period in which the 1941 Act was adopted, the Commission recommended the employment of a state prosecutor to handle violation cases with the assistance of county attorneys. This recommendation had been contained in several previous reports. Apparently, there were enough others beside Chase Securities Corp. and National City Co. who were charged with violation of the Blue Sky Law, *and as late as the year 1940-41*, to prompt the Commissioner repeatedly to urge the appointment of a special prosecutor to handle violations.

[fol. 1874] In the light of these facts there is no basis for assuming that there were no claims for violation of the Blue Sky Law to which the proviso could apply other than those involving Chase Securities Corporation and National City Co. It is tantamount to saying that when the Chase

[9] The reports may be noted judicially. See footnote 4 above.

Securities Corporation and National City Co. stopped selling in Minnesota, there were no other similar sales of securities made thereafter which the purchasers could claim violated the Blue Sky Law and that the hundred or more licensed dealers left after these two defendants retired could do no wrong, certainly defendant should be entitled to produce evidence to rebut so harsh an assumption.

That the Court erred in its conclusion as to what it calls "obvious legislative purpose" is readily apparent, also, from the difficulty which this Court acknowledges in accounting for the proviso clause. The opinion finally adopts the extreme position that the legislature should not have used the word "provided" and that:

> "Legislatures have habitually ignored the appropriate limitations of provisos (even those which they have themselves prescribed) and have used them to extend the scope of acts."

In so many words, this Court has admitted that while the language itself is restrictive and limiting, still this Court may assume that the legislature did not mean what it said—rather, that it intended the *opposite* (extension) of what it said (limitation).

Such a rule of construction is as unsustained as it is con- [fol. 1875] trary to reasonable inference.

The Court failed to recognize that provisos, delaying the operative effect of a new statute of limitation are commonly used, *not* for the purpose of reviving barred actions but only for the purpose of giving holders of *existing* claims a reasonable time within which to assert them before the new bar limits them as well—thus, to avoid a serious constitutional question.[10] Such a widely recognized purpose was not considered by this Court so far as the opinion shows.

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[10] The rule is well settled that statutes of limitation must allow a reasonable time after their passage for the commencement of suit upon existing causes of action; otherwise the statute will be held invalid as a denial of due process. Hill v. Townley (1891), 45 Minn. 167, 169, 47 N. W. 653; Russell v. H. C. Akeley Lumber Co. (1891), 45 Minn. 376, 379, 48 N. W. 3; Northern Counties L. Co. v. Excelsior L. M. & D. Co. (1920), 146 Minn. 207, 178 N. W. 497; Kozisek v. Brigham (1926), 169 Minn. 57, 210 N. W. 622; see 4 Dunnell, Minn. Dig., Sec. 5589, p. 208. See good discussion in 37 C. J., § 15, p. 697.

The Court cites only one case for its proposition that legislatures "habitually ignore" their own provisos, *State v. Browne* (1894), 56 Minn. 269, 57 N. W. 659. That case is obviously not authority for such an all-inclusive and broad rule of statutory construction, granting that *in that case*, this Court observed that "the act is so badly worded that we have been greatly puzzled as to what it does mean" and came to the conclusion *there* that the proviso *in that particular* statute could make sense only if construed to enlarge rather than restrict the early portion of the section. The Court there remarked that it was well known (in 1894) that statutes were usually enacted without regard to tech-[fol. 1876] nical rules of construction. However, this remark, based on what might have been thought to be practice in 1894, cannot with logic and good sense be applied to the 1941 legislature which adopted as a rule of law:

> "Provisos shall be construed to limit rather than to extend the operation of clauses to which they refer." See Section 645.19, *Laws 1941*.

The Court, in deciding that the legislature intended to revive all causes against Chase and National City, completely overlooked the fact that its finding is predicated upon the assumption that the legislature *knew* that the law was settled in this state by this Court that sales of the combined units ("this stock") were in violation of our securities law. Yet how could this possibly be so when this Court had not decided that question, and did not do so until this very decision.

The Court also ignored another statutory rule of construction, that in ascertaining legislative intent the Court may presume that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable" and that "the legislature does not intend to violate the Constitution of the United States or of this State," Ch. 492, *Session Laws of Minn. for 1941*, § 17.

In reconsidering Section 18, we ask no more than that this Court follow its own admonitions which it stated upon the former appeal in these very cases (209 Minn., at p. 157):

> "We cannot agree that, in the process of decision, [fol. 1877] judge's 'guess' concerning such a problem or any other. Nothing is more essential in that process than for the judge to watch constantly the line between

reasonable inference or logical deduction on the one hand and guess or conjecture on the other. The former constitutes the only sound material for decision.

* * * * * * *

"Such capricious distinctions are not to be imputed to the legislature. Unjust and indefensible results of a statute are to be avoided by construction, if possible. 6 *Dunnell, Minn. Dig.* (2 ed. and Supps.), § 8943."

III

Defendant Had Vested Rights in This Court's Prior Judgment That the Blue Sky Action Was Barred. The Legislature Could Not Constitutionally Deprive It of Those Rights. Even Campbell v. Holt Emphasizes This Rule.

While the opinion mentions the prior appeals in these cases, the Court nevertheless proceeds on the indisputably erroneous assumption (as shown particularly by paragraph No. 5 of the opinion) that the issue of a statutory action between these parties was still a *pending* action—as though that prior adjudication did not exist. It completely overlooked the fact that this Court had already decided that plaintiff's right to maintain an action for breach of the registration provisions of the Blue Sky Law was barred. It was a total and final determination of the rights as between [fol. 1878] plaintiff and defendant on that issue, *i. e.*, the straight statutory action upon which judgment was entered. The Court remanded the case for further proceedings only on the remaining issue of record. There can be no question but that the rights of both parties on the issue of statutory liability became merged in the judgment. Defendant thereby obtained a fixed and vested right in that judgment which right cannot constitutionally be divested by a subsequent act of the legislature.

That defendant has a vested right which the legislature cannot take away was held by this Court in *Johnson v. Jefferson* (1934), 191 Minn. 631, 255 N. W. 87. In 1929, the Industrial Commission made a final order denying claimant a rehearing on a settlement. This Court later held in *Rosenquist v. O'Neil* (1932), 187 Minn. 375, 245 N. W. 821, that the Commission did not have the authority to reconsider a decision. Subsequently, in 1933, the legislature amended the law to authorize the Commission to

set aside its decision and grant a new hearing *at any time* prior to a review of the order by the Court. In reliance upon this amendment, the claimant applied for and was granted a rehearing on the 1929 decision of the Commission.

This Court reversed the order, saying that the 1933 amendment could not have retroactive effect under the State and Federal Constitutions, even though affecting only the remedy. The opinion said (pp. 633-635):

> "If the prior proceedings of the Commission fixed [fol. 1879] and finally determined the rights of the parties and left the employer relea ed from further liability as effectively as a judgment would have done, then the legislature was without the power to authorize the Commission to open up the award and grant a new hearing.
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> * * * * * * *
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> "This was a substantive right, and the amendment of 1933, although affecting the remedy, in effect impaired the vested rights of the relators in their release from further liability and as such as in violation of the due process clause of our Constitution and the Fourteenth Amendment to the Federal Constitution.
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> * * * * * * *
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> "We therefore conclude that under our decision in the *Rosenquist* case, 187 Minn. 375, 245 N. W. 621, the rights of the relators had become finally determined and fixed prior to the passage of the amendment of 1933 and that it was beyond the power of the legislature to authorize the Commission to reopen the case. It being our duty to give an interpretation to an act which makes it constitutional when that result may reasonably be reached, we construe L. 1933, c. 74, as not applicable to cases where rights had become fixed and vested prior to its passage *Oppegaard v. Board of C. Commrs. of Renville County*, 110 Minn. 300, 302, 125 N. W. 504, 505 * * *"

The *Johnson* case was followed with approval, on the same point, in *Terres v. International Fuel Co.* (1940), 208 Minn. 259, 293 N. W. 301.

One of the basic reasons stated by the Court in *Campbell v. Holt*, why a legislature had the power to remove the [fol. 1880] statutory bar to a remedy was because the debt *continued* and was not destroyed by the bar, as shown by the fact that the outlawed debt was good consideration for a new promise to pay. This is the fundamental theory discussed also in *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. 957. But where there is a final adjudication and judgment between the parties, this Court has held that such is not good consideration for a new promise to pay so as to revive the statutory period. *Olson v. Dahl* (1906), 99 Minn. 433, 109 N. W. 1001. So, in the case at bar, there was nothing existing as to which "a lifting of the bar as to remedy" could have any operative effect. It is gone forever as between these parties.

Accordingly, in the final analysis, the "vested rights" principle recognized in both *Campbell v. Holt* and in *Kipp v. Johnson* actually sustains defendant's claim that the legislature cannot constitutionally abrogate a right vested in defendant by the prior judgment. As those cases there said, such an act would deprive the party of his property without due process of law. That is precisely what the 1941 law does, as now construed by this Court.

The Court's opinion, then, overlooked the true nature and extent of defendant's adjudicated right in this case. It proceeded erroneously as though there had been no prior adjudication and judgment.

[fols. 1881] IV

The Court Erred in Deciding This to Be a Tort, Not a Statutory Action, and in Holding Inapplicable Cases Declaring It Unconstitutional to Revive Barred Statutory Actions. Common Law Remedy Case of Campbell v. Holt Is Not in Point

The Court describes this as an action in tort to recover the purchase price of unregistered stock sold in violation of the Blue Sky Law, and places it in the category of common law actions for debt or damages for tort. It then applies *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483, involving a common law action for debt, the barred remedy for where it was held by a divided Court could be lifted by law. The opinion here also says that the action in the case at bar is

distinguishable from actions created by statute where the same statute includes a limitations period within which the action must be brought.

The Court overlooked the fact that this action is one founded "upon a liability created by statute" arising from defendant's business in Minnesota as this Court decided upon the prior appeals in these very cases. It is a pure *statutory* cause of action, unknown at common law. See also, *Webster v. U. S. I. R. Co.*, 170 Minn. 360, 212 N. W. 806; *Edson v. O'Connell*, 190 Minn. 440, 252 N. W. 217; *Mertz v. Hudson Mfg. Co.*, 194 Minn. 636, 261 N. W. 472. It is definitely not an action for tort. Therefore, assuming [fol. 1882] that *Campbell v. Holt* is still good law as to common law debt or damage actions (which we do not here concede, for reasons fully stated in our main brief, pp. 249-255), it is obviously not applicable to actions such as this, based on liabilities "created by statute."

The only question remaining is whether Sec. 9191 (2) conditions that statutory liability. If so, this case then comes squarely within the well-established rule that the legislature has no constitutional power to revive statutory causes of action where the liability created by statute is subject to specific statutory limitations even though not found in the same statute. See for example, *Danzer & Co. v. Gulf & Ship Co.* (1924), 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612.

While it is true that in a certain number of the statutory action cases, the limitations period was enacted at the same time and as a part of the statute creating the right, such as *Kannellos v. Great Northern Ry. Co.* (1922), 151 Minn. 157, 186 N. W. 389 (involving the Federal Employers' Liability Act), it is not required that the limitations provision be found in the same statute as that creating the liability if its application to the liability is clear. This Court in two cases, one before and one subsequent to the *Kannellos* case, held that the statute creating the right or liability and the statute providing limitations will be read together, even though not located in the same act. *Negaubauer v. Great Northern Ry. Co.* (1904), 92 Minn. 184, 99 N. W. 620; and *Szorka v. Northwestern Bell Telephone Co.* (1927), 171 Minn. 57, 213 N. W. 557. *The opinion in the* [fol. 1883] *case at bar failed to note the precise statutes in-*

volved in the Negaubauer case and overlooked the Szorka case.

In the *Negaubauer* case, the provision in the Montana law limiting the time for commencement of wrongful death actions was Subsection 3 of Section 514, which in turn was one of eight sections, covering limitation periods for various types of actions, grouped together in Chapter III (entitled "Time for commencing actions other than for the recovery of Real Property") of Title II (entitled "Time of commencing actions") of Part II of the Montana Code. The arrangement of the limitation provisions was typical and was not unlike that set forth in Chapter 77 of the *Minnesota* Statutes (§§9189-9195). There were separate sections dealing with actions to which different time periods applied, *viz.*: §511, 10 years; §512, 8 years; §513, 5 years; §514, 3 years, etc. Section 514 involved in the case had three subdivisions: (1) actions on unwritten contracts, (2) actions against a sheriff, and (3) actions for wrongful death only. On the other hand, the sections creating causes of action for injury or wrongful death of a minor (§578) or wrongful death of an adult (§579), both cited in the opinion, were located among a series of 23 sections grouped under Title III, entitled "Parties to Civil Actions," *i.e.*, under an entirely different heading and title number.[11] Section 514, [fol. 1884] therefore, was not solely related to the wrongful death section in suit in the case (§578, covering death of or injury to a minor) as was true in the *Kanmellos* case. It also related to contract actions and actions against a sheriff, and it related only partly to Section 578 since it did not cover injury actions. It also covered actions under Section 529 (not in suit), relating to death of adults. It was separate and distinct from the death action statutes. This Court, however, construed them together and held that

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[11] This separation occurred in the 1895 codification, because in the last prior compilation, Compiled Stat. of Montana for 1887, Sections 981-82, the limitation provision was attached as a proviso to Section 82 which, with Section 981, provided a cause of action for wrongful death. This was the form of the law when the case of *Thercour v. Northern Pacific Ry. Co.*, 64 Fed. 84, referred to in the quotation from the *Negaubauer* opinion, was decided.

the limitation section conditioned the liability section, saying:

> "It is true that the limitation upon the right of action is not embraced in the same section that gives the right, but the section giving the right of action and the section imposing the limitation are a part of the same statute, which is entitled 'An act to establish a Code of Civil Procedure,' approved February 14, 1895. Sanders' Montana Codes and St. 1895, §§510, 514, 578, 579. The provision giving the right of action and the one limiting it, being part of the same act, are to be construed together, precisely as if they had been placed in the same section, for the right is created and the limitation imposed at the same time. In principle, it can make no difference whether the limitation is in the form of a proviso to the section giving the right of action, as was the statute of Montana when the case of *Theroux v. Northern Pac. R. Co.*, *supra*, was decided, or in a separate section of the same statute."

It was sufficient that limitations section related to and con- [fol. 1885] trolled the liability section and that both were found in the same statute book.

So, in the case at bar, the Blue Sky statute creating the liability and the statute limiting actions "upon a liability created by statute" must be read together though they appear in separate chapters of the statute book.

In the *Szorka* case, the state statute created a liability against a municipality for injuries caused by defective streets. But the city charter (*not* the statute) provided that an action thereon would be barred unless the claimant filed his claim within 30 days of the injury. This Court held that both provisions, *one in the statute and the other in the charter*, should be construed together; that the limitations section in the charter conditioned the right given by statute. This Court said that they were as much a part of and conditioned each other as the liability and limitations provisions involved in the case of *Danzer & Co. v. Gulf & Ship Co.*, 268 U. S. 633, 69 L. Ed. 1126, and *Kanuellos v. Great Northern Ry. Co.*, 151 Minn. 157, 186 N. W. 389, where the two provisions were side by side:

> "The same principle is applied in other cases where a right is given and a condition attached as a part of

the cause of action. Thus, in *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, Justice Butler referred to a statutory provision which would constitute 'a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.' And in *Kannellos v. Great N. R. Co.*, 151 Minn. 157, 186 N. W. [fol. 1886] 389, involving the Federal Liability Act, Chief Justice Brown said that, 'where a statute gives a new right of action,' the time fixed for its enforcement is 'an element in the right itself.'".

It added that the "weight of authority" favored the view that after the expiration of the statutory period the legislature did not have the constitutional power to revive such a cause of action.

A situation similar in principle to that here presented was considered by the United States Supreme Court in *Davis v. Mills* (1904), 194 U. S. 451, at 455, 48 L. Ed. 1067. A limitations provision, applying generally to actions "against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce *a liability created by law*," was enacted "at a different time" and located in a different title from the specific statute creating a special liability on "trustees" of corporations for failure to file annual corporate reports. Yet, it was construed to condition and limit the specific statutory cause of action, the Court saying (Holmes, J.):

> "The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be [fol. 1887] reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.
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> . . . . . .

> " * * * we think that this §554 so definitely deals with the liability sought to be enforced that, upon the principles heretofore established, it must be taken to effect its substance so far as it can, although passed at a different time from the statute by which that liability first was created."

The case of *Davis v. Mills* is cited with approval in *Danzer & Co. v. Gulf & Ship Co.* (1924), 268 U. S. 633, 69 L. Ed. 1126, which said, as noted above, that the action created by statute could be conditioned by another statute, whether "by the same or another provision," and could not be revived over the objections of lack of due process of law. On the ground of a statutory cause of action, it distinguished *Campbell v. Holt* by calling attention to the fact that the latter case was only an action on contract or debt, as to which the *remedy* could be revived constitutionally.

It should be borne in mind that Subdivision 2 of Section 9191, which has been held to limit the time within which to sue for breach of our Blue Sky Law, *Barzinski v. Kingsor Investment Co.*, 192 Minn. 335, 256 N. W. 233; *Pomeroy v. National City Co.*, 209 Minn. 155, 296 N. W. 503, is *not* a general "catch-all" provision covering actions regardless of nature. It is a limitation expressly restricted to actions on "liability created *by statute*," much like the limitations [fol. 1888] statute considered in the *Davis* case. It was as much a part of the statute creating the liability as were the limitations provisions in the *Negaubauer* and *Szorka* and *Davis* cases. In all instances, the two provisions were held to be as closely related as if they had been enacted in the same section or the same chapter, and each such limitation provision was held to condition the statutory right of action.

Where there is an existing limitations statute which is legally applicable, this Court has held that the legislature need not re-enact it into a new statute creating a new cause of action—the two will be construed together, *Strzicek v. Zenith Furnace Co.* (1929), 176 Minn. 554, at 557, 223 N. W. 926, saying,

> " * * * when the legislature passed the act of 1913 without any limitation therein, the lawmakers had in mind the general statute of limitations and left the matter of limitations to be governed by the existing law."

That reasonable rule should control here.

We submit that the Court inadvertently overlooked the precise principles of law here re-examined. As before urged (Main Brief, pp. 243-248; Reply Brief, pp. 11-12; Re-brief, p. 48), the authorities are settled that in cases, like this, involving only a statutory cause of action, there is no legislative power to revive barred actions. The old and discredited case of *Campbell v. Holt*, concerned only with "lifting of a bar against a remedy" on a common law claim is not in point.

[fol. 1889]

V

The section as Construed by the Court Is Unconstitutional and Void as Special or Class Legislation, and Is Contrary to Sound Public Policy.[12]

It seems clear that the section, as construed by the Court, is special and class legislation of the most vicious kind. It is as though the two New York corporations and their particular stock were expressly named and described in a law designed and enacted, so this Court now says, to impose virtually absolute liability upon those two particular corporations and in favor of the purchasers of two certain securities.

In other words, this Court finds that the legislature in effect enacted, in lieu of the proviso clause:

> "* * * but as to the 'combined units' sold in this state prior to the crash in 1929 by Chase Securities Corporation and National City Company, and notwithstanding the decisions of the Supreme Court in the *Pomeroy* and *Donaldson* cases with which the legislature is dissatisfied, and action may be brought within one year following the effective date of this section and all pending actions upon such stock are hereby automatically revived without further act of plaintiffs therein."

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[12] Such a question may properly be considered for the first time on reargument, State v. Cooley (1893), 56 Minn. 540, at 548, 58 N. W. 150; particularly, where, as here, the point arises for the first time out of the court's decision.

This result is indeed a most unusual kind of legislation. It is more than enough to invite the studied curiosity of not only the parties directly affected but the public as a [fol. 1890] whole, including the Commissioner of Securities who initiated and sponsored the bill, and legislators who voted for an act, innocently entitled as to this section, "An act * * * fixing a *limitation* of actions." It is obviously contrary to both State and Federal Constitutions.

1. *Under our State Constitution:*

Such legislation is prohibited by our State Constitution, *Article* 4, *Section* 33:

> "*Special Legislation Prohibited*—In all cases when a general law can be made applicable no special law shall be enacted * * *"

and *Article* 4, *Section* 34:

> "*General Laws*—The legislature shall provide general laws for the transaction of any business that may be prohibited by section one of this amendment (Section 33 above), and all such laws shall be uniform in their operation throughout the state." (Insert ours.)

The law is stated in 1 *Dunnell's Minnesota Digest*, Sec. 1676, etc., pp. 957-73. The constitutional provision was adopted in 1892 to prevent "log-rolling" and "purely arbitrary" laws or laws applying "to particular members of a class." A law which is general in form is, nevertheless, unconstitutional if it is special in operation—just as much as if it were special in form. *Todoen v. City of Warren* (1920), 146 Minn. 181, 178 N. W. 741.

Among the numerous cases holding special legislation void is *Szarka v. Northwestern Bell Telephone Co.* (1927), 171 Minn. 57, 213 N. W. 557. The state statute imposed [fol. 1891] upon municipalities liability for injuries resulting from dangerous conditions in streets. The Minneapolis charter thereafter included a provision that no action could be maintained against the city for such liability unless the claimant filed a written notice of such claim within 30 days after the injury. Plaintiff, injured in August, 1924, admittedly had failed to file such notice within the proper time and his action was barred by the charter provision.

In 1925, however, the state legislature enacted a statute providing that claims could be filed during the months of January and February, 1925, against cities of the first class for injuries and that they would be valid although not filed within 30 days of the date of the injury. This Court analyzed the statute carefully and found that it was intended (as here found) to apply only to a particular claim or action which theretofore had been barred, and that the statute was unconstitutional as "special legislation." After recognizing the power of the legislature to make proper classification of subject matter, the opinion said:

> "Whatever may be the proper application of the rule, it is without the effect claimed for it here. If it were, all that the Legislature need do is to describe a situation from which there was no cause of action at the time, and provide that from such a situation, defined for the occasion, a cause of action arose."

This is exactly the effect of the 1941 law upon barred claims, as now construed by this Court.

There are numerous other decisions of this Court which [fol. 1892] adequately sustain defendant's claim. Thus, in *Application of Humphrey* (1929), 178 Minn. 331, 227 N. W. 170, and *Application of Grantham* (1929), 178 Minn. 335, 227 N. W. 180, this Court held invalid statutes obviously designed to cover only particular individuals or very restricted classes. This Court here reiterated well-established rules of legislation: that a classification cannot be based on existing conditions, thereby excluding those who may thereafter be in the same situation, nor can it limit its operation to those who are within its provisions only at the time of the passage of the Act; and that matters or factors which differentiate the persons covered by an act from those not covered must be germane to the subject matter with which the Act deals and must suggest some reasonable and natural ground of distinction. See, also, other cases cited in 1 *Dunnell's Minn. Digest*, Section 1692, p. 971, and Supplement.

2. *Under the Federal Constitution:*

Article XIV, Section 1 of the Federal Constitution provides, in part:

> "nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to

any person within its jurisdiction the equal protection of the laws."

The decisions of the United States Supreme Court construing these provisions with reference to special or class legislation are numerous. It should be sufficient for [fol. 1893] this Petition to quote from this Court's own discussion of the law in *Dimke v. Finke* (1940), 209 Minn. 29, at 33-34, 295 N. W. 75:

> "Legislation which selects particular individuals from a class and imposes upon them special burdens from which others in the same class are exempt is class legislation, violative of the equal protection clause of the Federal Constitution and of the uniformity clause of the State Constitution. * * * These constitutional limitations do not curtail the power of the legislature to classify and to adopt different rules for different classes. They both require, however, that the classification be not unreasonable, arbitrary, or discriminatory, but that it operate equally and uniformly upon all persons in similar circumstances, *Reed v. Bjordson, supra*; that it is reasonable and based upon actual differences, *Miller v. Wilson*, 236 U. S. 373, 35 S. Ct. 342; 59 L. Ed. 628, L. R. A. 1915 F, 829; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495; 57 S. Ct. 868, 81 L. Ed. 1234, 109 A. L. R. 1327; *State v. Pehrson*, 205 Minn. 573, 287 N. W. 313."

See, also, such case as *State v. Pehrson* (1939), 205 Minn. 573, 287 N. W. 313.

The question is fully discussed in 12 *Am. Jur.*, § 468, p. 127. It is there said (Sec. 468, at p. 129):

> "The guiding principle most often stated by the courts is that this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed."

[fol. 1894] In 16 *C. J. S.*, § 489, pp. 954-5, it is said likewise:

> "In order to be valid, a statutory classification must reasonably promote some proper object of public wel-

> fare or interest, must rest on real and substantial differences, having a natural reasonable and substantial relation to the subject of the legislation and must affect alike all persons or things within a particular class or similarly situated."

These and related principles of law, thus secured by the 14th Amendment, have been breached by a special statute directed against certain corporations and as to particular securities. Granting that legislation may be valid which relates only to certain classes of persons, the law has been well established by cases everywhere that such classification must be reasonable and must be based on logical and distinguishing characteristics. The proviso, as here interpreted, conforms to none of these tests. If there ever was a statute, as now construed by this Court, which was unreasonable, arbitrary and discriminatory and which imposed special burdens on certain corporations and bestowed special privileges on certain persons, this is it.

As construed by the Court, the statute is unconstitutional. Such a construction should not be applied under the rule that where two constructions are equally possible, and that is the very least that the Court can in fairness say in our favor, then the Court must adopt that which will avoid the [fol. 1895] constitutional question. This principle is too well settled to admit of doubt. See for example, *Crowell v. Benson* (1931), 285 U. S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598, and *Dimke v. Finke* (1940), 209 Minn. 29, at p. 32, 295 N. W. 75. It is consistent with Section 17 of the General Construction Law (Chapter 492, *Session laws of Minn. for 1941*), which provides that in ascertaining legislative intent the Court "may be guided by the following presumptions":

> "* * * The legislature does not intend to violate the Constitution of the United States or of this state."

Or, stated another way, a law should be construed, if possible, as to avoid any serious question of constitutionality. 6 *Dunnell's Minn. Dig.*, Sec. 8931, p. 73; *State v. Oakland Motor Co.* (1928), 176 Minn. 78, 222 N. W. 524; *Driscoll v. Edison Co.* (1939), 307 U. S. 104, at 114-15.

3. *Under sound public policy:*

The opinion shows that the Court failed to consider perhaps the most fundamental question of all: whether it is in the interest of sound public policy to sanction and encourage legislation *specifically intended* to favor a particular and arbitrary class of litigant, and resulting in the undoing and reopening of a final adjudication of this Court (disregarding for the moment the matter of abstract constitutional power to do so). The net effect of this decision, [fol. 1896] as a matter of judicial principle, is to establish just such an unparalleled precedent. To allow such a precedent to stand as the deliberate judgment of this Court will, we submit, lead to innumerable socially and legally undesirable consequences:

—as to the legislature, it will invite special interests and lobbys of all kinds, who might be dissatisfied with a decision of this Court on a rule of law, to bring pressure upon legislators and thus subject the latter to unwholesome influences and temptations of log-rolling tactics—the very evil acknowledged by all to exist in special legislation.

—as to this Court, it will result in its final decisions no longer being final; they will always be subject to the possibility of being overturned by legislative act (as here) even as between the specific parties involved in the decision. This Court will in effect abdicate from its position as the holder of final judicial power in this state.

—as to the general public as a whole, no rule of this Court or even a decision in a particular case will be worthy of reliance as a guide to future social and business relationships. The law will not be as this Court may declare it to be even in a particular case—but only as some legislature later may declare it by retroactive enactment.

Until this decision, we believed it was settled policy of this Court, from the very beginning, to discourage "fraud, oppression and interminable litigation" by not allowing "a party to delay a contest until it is probable that papers may be lost, facts forgotten or witnesses dead"—and that [fol. 1897] all of this was necessary "for reasons of private justice and public policy." See *Bachtritz v. Hayes-Lucas*

Lumber Co. (1937), 201 Minn. 171, at p. 176, 275 N. W. 694, and 6 *Dunnell's Minnesota Digest*, Sec. 5586. This Court in this case has said, in effect, that the justice and purpose of this established policy may now be circumvented by a litigant, past or prospective, who may go to the legislature 5, 10 or 15 years after a claim or cause of action has been barred by all existing law (and even where this Court has so declared in a specific case), tell enough of the legislators that a decision of this Court was wrong and should be corrected as to such litigant or a group of litigants having a similar claim, and induce the legislators by devious means to enact a specific statute to that end. Thus, *specific* "legislative intent" would be easily accomplished and the special-interest purpose achieved.

The Court, we submit, completely overlooked the total effect of its interpretation of the 1941 law, and the legislative policy thereby approved—if its finding of legislative intent is correct. This is but another illustration of what full analysis of the decision makes apparent.

[fol. 1898]

VI

If the 1941 Law Is So Construed, the Title of the Chapter Is Misleading and the Section Invalid Under Article 4, Section 27 of the State Constitution.

Article 4, Section 27 of the State Constitution, provides:

> "*Laws to embrace but one subject*—No law shall embrace more than one subject, which shall be expressed in its title."

As stated in 6 *Dunnell's Minnesota Digest*, § 8906, p. 53, the object of the provision is to prevent "log-rolling" legislation, and to prevent surprise and fraud upon the people and the legislature by including provisions in a bill whose title gives no intimation of the proposed legislation or of the interests affected. A title may be general and need not be an index of every detail, yet, if it attempts to particularize, it must be accurate and not misleading. As said in 6 *Dunnell's*, § 8909, p. 55:

> "If the title is restrictive, carving out for consideration a part only of a general subject, legislation under such title must be confined within the same limits. Provisions outside such limits are void, though they might have been included in the act under a broader title."

Numerous cases of this Court are cited for the statement.

In the case at bar, the title to Chapter 547 is of the latter kind—a restrictive title. See *Sweet v. Richardson* (1933), [fol. 1899] 189 Minn. 489, at 494, 250 N. W. 46. It starts out with the phrase:

> "An act relating to securities and persons issuing the same. • • •"

but it then "carves out" special subjects in a series of clauses, each relating to the various subject matters of the Act, one of which says:

> "• • • fixing a limitation of actions. • • •"

The title ends with a citation of the various sections of *Mason's Minnesota Statutes of 1927*, and *Mason's Supplement 1940*, "amended" or repealed by the chapter, including Section 3996-24. A comparison of the old Section 3996-24 and Section 18 of Chapter 547 shows that the title reference word "amending" is deceptive under the construction made by this Court, because Section 18 constitutes a new and entirely different and complete law, creating for the first time a special limitations statute for certain actions in the Blue Sky Law itself. In *Egekvist Bakeries, Inc., v. Benson* (1932), 186 Minn. 520, 243 N. W. 853, the Court held a so-called and so-entitled "amendment" unconstitutional and void because it was "distinctly new legislation on a new subject," saying:

> "The qualifying words characterize the old law to be changed rather than a new subject of new law. It is deceptive, unintentionally so of course; but deception is the very thing barred by the constitutional requirement that acts of the legislature must have unity of subject and keep within the fair meaning of their title."

[fol. 1900] When the Court virtually rewrote this section it left such a situation with regard to the title, that, using the title as a guide, legislators, lawyers and laymen alike must be surprised at the text and these defendants unintentionally deceived, the very thing the constitutional provision was designed to prevent. Surprise is, we believe, inherent in the attached statements of the Commissioner, and of Representatives Huhtala and Memmer.

We submit, on this Court's construction of the section, that the title reference to such section, "fixing a *limitation* of actions," is as misleading as any title could be—because the section is now held to have had just the *opposite* effect as to all actions or claims involving violations of the Blue Sky Law which occurred since 1917 and down to July 1, 1936 (more than 5 years prior to the effective date of the chapter). As to *all* of them, the section, so the Court says, fixed an *extension* of time to sue for one year or revived the previously barred claims and actions. It is indeed remarkable if the legislature considered such a fundamental and radical change in existing law so inconsequential as not to need reference thereto in the title and if it believe it adequately covered by the word "limitation."

In a large number of cases, and without exception, this Court has held unconstitutional acts having titles and texts resulting (as here) in opposite effects.

Thus, in *Simond v. Sullivan* (1898), 71 Minn. 517, 74 N. W. 280, the title of the law said it was one to *reduce* [fol. 1901] compensation of certain county employees. The text authorized *increases* in compensation as to certain of such employees. This Court said:

> "*We cannot imagine a more flagrant violation of the constitutional provision than one which, under the guise of a title like that of the act now before us, authorizes by act the very opposite of the one expressed*—an increase of compensation or salaries, instead of a decrease. As to all officers therein named whose salaries or compensation are authorized to be increased, it contravened the fundamental law before mentioned, and cannot be upheld." (Italics ours.)

To the same effect is *State v. Sullivan* (1898), 73 Minn. 378, 76 N. W. 223.

This case presents, on the Court's construction, just as "flagrant" a "violation" where under the guise of a title "*fixing a limitation of actions*" it is held to do the very opposite, namely, *unfix* the limitations previously adjudicated by this Court and revive claims and actions already barred.

In *Palmer v. Bank of Zumbrota* (1898), 72 Minn. 266, 75 N. W. 380, an act was declared void which, in its title provided only for the *extension* of the term of corporations;

but in its text provided that corporations might amend *any* of their articles on any subject which might have been covered by the original articles.

In holding a statute invalid on this ground, in *State v. Chapal* (1896), 63 Minn. 535, 65 N. W. 940, this Court said, [fol. 1902] what we submit must be said here, assuming this Court's construction is correct:

> "No lawyer or layman can place the statute and its title side by side without being at once struck by the radical discrepancy between them."

See, also, *State* v. *Palmquist* (1927), 173 Minn. 221, 217 N. W. 108; *State v. Porter* (1893), 53 Minn. 279, 55 N. W. 134.

If the title is to be given any reliance, as our constitutional provision and our cases say, not a single person, be he legislator or member of the public, could tell from the title that, submerged in a lengthy statute covering 29 pages of the printed session laws and in the middle of a lengthy section having as its central thought and purpose a six year limitation of all actions, there was a 41 word proviso which would revive for one year all claims since 1917. Looking at the matter realistically, it is highly improbable that any legislator read the law, or interpreted the proviso as this Court now has, especially inasmuch as this chapter was passed in the closing rush of the 1941 session.

It is apparent from the opinion in the case at bar that this question was not considered by this Court when it decided the case. If, as stated above, the Court's reconstructed statute *providing for revivor and the lifting of the bar of limitations previously held to apply* is laid beside the title *"fixing a limitation of actions"*, it requires clever mental gymnastics to cramp the text into the title. The answer must be that this Court either overlooked or gave insuf- [fol. 1903] ficient attention to the disparity between the title and its reconstruction of the section. The construction of the proviso, which we urge, results in no disparity and therefore raises no constitutional question of invalidity. Such construction should therefore prevail under the above-mentioned rule that the Court must avoid a construction which raises doubt as to constitutionality (*ante*, pp. 59-60).

Conclusion

We submit that this is a case where a rehearing should be granted, for all the reasons urged.

The opinion shows that the Court inadvertently failed to consider the full legal effect of its judgment in this case on a prior appeal, the absence of any legislative intent to reverse that judgment (as distinguished from an intent here found to change "the law"), and the absence of constitutional power to do so under the due process clause. The very decision which this Court said is binding upon it, *Campbell v. Holt*, says that this cannot be done, even if the legislature had intended that result. Such error, alone, is more than adequate ground to justify a re-examination and re-argument of the entire issue.

Moreover, to the extent that this Court may properly decide in this case a broader question of revival of barred claims generally, the opinion assumes a legislative intent, [fol. 1904] which is contrary to every known and provable fact, and denies defendant its fundamental right to submit such proof. As the United States Supreme Court in the *Ohio Bell Telephone* case said, this constitutes "condemnation without trial," and violates the due process clause as well as every rule of fair play. We are confident that the Court did not intend to reach such a conclusion and to close its eyes to readily available and competent evidence showing that, in truth and fact, the legislature did not feel or intend as the opinion has found. We are certain, also, that this Court did not intend to construe the section so as to make it entirely unconstitutional (as special legislation and misleading title).

Finally, we submit that the Court could not have intended to lay down an unprecedented principle that a person or a special group of litigants, dissatisfied with an adjudication of this Court in a single case, can go to the legislature and have enacted a law to re-create for their special interest and purpose what this Court had said no longer existed. The opinion, as it now stands, is ample authority for such a practice. Unless it is reconsidered and changed, it will plague the legislature and this Court for all time to come.

As we said at the outset, the error may be attributable to the fact that of the many issues of fact and law briefed and argued on appeal, this statutory question was not considered primary. It is the purpose of the re-hearing pro-

cedure to afford the Court an opportunity to reconsider questions emphasized for the first time in the Court's deci-
[fol. 1905] sion. In the interest of justice to all parties concerned, it should be invoked here.

Respectfully submitted, F. H. Stinchfield, John M. Palmer, Floyd E. Nelson, Stinchfield, Mackall, Crounse & Moore, Attorneys for Defendant-Appellant, 1100 First National-Soo Line Building, Minneapolis, Minnesota.

[fol. 1906] Exhibit A

State of Minnesota,
County of Ramsey, ss.

Robert L. Smith, Jr., being first duly sworn says:

1. That he is the duly qualified Commissioner of Securities, of the Department of Commerce of the State of Minnesota, and has been such since February first, 1939.

2. That he has been asked about Chapter 547, Laws of Minnesota, 1941, and especially Section 18 thereof.

3. That as early as 1939 the affiant and his office thought it desirable to submit to the 1941 session of the state legislature various amendments to the securities law.

4. Among the various steps in the consideration and preparation of such amendments during the year 1940, the affiant had conferences with the local legislative committee of the Investment Bankers Association and their counsel concerning various revisions. One of the matters discussed specifically with them was the need for a limitations statute as to transactions pertaining to the sale of securities, so that licensed dealers and brokers could carry on their business without the fear of lawsuits for an unlimited period thereafter. As a result of these conferences, such counsel prepared a preliminary draft December 20, 1940, and submit-
[fol. 1907] ted it to affiant. It contained the following limitations provision:

"3996-24. *[Nothing in this act shall limit statutory or common law right of any person to bring action in

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* Matter struck out.

any court for any act involved in the sale of securities, or the right of the state to punish any person for any violation of any law.] *No action shall be maintained for relief upon a sale of securities made in violation of or noncompliance with any of the provisions of this Act, or upon a sale of securities made in violation of or noncompliance with any of the terms or conditions of a registration thereof under this Act, or for failure to disclose that the sale thereof was made in violation of or noncompliance with any of the provisions of this Act or in violation of or noncompliance with any of the terms or conditions of a registration thereof under this Act, unless commenced within three (3) years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this Section, more than two years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date, and provided further that no purchaser of a security otherwise entitled thereto shall bring an action for relief of the character above set forth who shall have refused or failed to accept, within thirty days after delivery, a written offer delivered to him from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of payment to the date of repayment, such interest to be com-* [fol. 1908] *puted at the same rate as fixed interest or dividend rate, if any, provided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser of such securities. Such written offer so delivered to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commission prior to delivery thereof.*

The time for the commencement of any action specified in this Section shall be extended by reason of any fact specified by the Statutes of this State as now in effect or as hereafter amended as reasons for the extension of the time for the commencement of actions, and

for the time specified therein, provided, nevertheless, that no person who has filed with the Commissioner of Securities or with the Secretary of State of this State an appointment of agent for the service of process, upon which agent valid service in any such action can be made, shall be deemed to be out of the State so long as such appointment is in effect.

Nothing in this Section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the State to punish any person for any violation of law."

The preliminary draft was studied and was changed substantially, including the lengthening of the limitations period to six years, before introduction as a bill in the legislature.

5. That affiant was aware of the claim of implied fraud made in pending Blue Sky litigation and was concerned about the possible continued indefinite liability of sellers [fol. 1909] because it would tend to drive out of the investment business responsible business men to the ultimate disadvantage of the investing public. In order to permit all purchasers of securities, however, ample opportunity to assert just claims under the Blue Sky Law, affiant recommended that a six year period be provided, rather than the one to three year periods specified in the great majority of analogous state statutes.

6. That affiant appeared before the Judiciary Committee and its Subcommittee of the House and explained the various proposed revisions, including the limitations section.

7. That affiant knew of the many pending suits against National City Company and Chase Securities Corporation, including the *Pomeroy* and *Donaldson* cases; that in the consideration of a limitations statute covering claims growing directly or indirectly out of violations of the Blue Sky Law, the question of lifting the bar as to any cause of action already barred under the then law against any seller of securities was not contemplated by affiant, and he does not recall that anyone else in his department or in the legislature raised the question or expressed a desire that the pro-

posed amendment should be drawn to lift the bar as to any outlawed claims or suits; that it was the purpose of himself and of his office that the limitations section limit the time within which suits could be brought to a reasonable period.

8. That after the decisions of the Supreme Court in the [fol. 1940] cases of *Pomeroy v. National City Company*, or *Donaldson v. Chase Securities Corporation*, on January 10, 1941, no mention was made by anyone connected with the proposed revisions, so far as he can recall, either in his office, in the legislature or anywhere else, as to any desire or intention to enact a statute which would have the effect of reopening claims or actions already outlawed, or which would change the statement of law just decided by the Supreme Court.

9. At no time did the affiant, nor to his knowledge anyone in his department, express to anyone any views or opinions about the purpose of the limitations section which were inconsistent with the foregoing.

Robert L. Smith, Jr.

Subscribed and sworn to before me this 25th day of January, 1944. Marie H. Lemmer, Notary Public, Ramsey County, Minn. (Seal.)

EXHIBIT B

STATE OF MINNESOTA,
County of St. Louis, ss:

I am a lawyer practicing at Virginia, Minnesota. I am a member of the Senate of the State of Minnesota from the Sixty-first legislative district; and I was a representative [fol. 1941] throughout the legislative session of 1941. During such session I was a member of the Judiciary Committee of the House.

I recall the consideration by such committee of H. F. 1265, which was a bill for an act to regulate the sale of securities, and, among other things, fixing a period of limitations. This bill was enacted into law as Chapter 547 of the Laws of Minnesota of 1941.

I served on the subcommittee of the Judiciary Committee, which considered this bill, and, in accordance with our practice, read, word for word, each section before making our report to the Judiciary Committee. I can say definitely

that in the consideration of this bill by said subcommittee, neither in connection with the consideration of the bill as a whole, nor any part thereof, particularly Section 18 relating to a period of limitations, was any consideration or discussion given to the decisions of the Supreme Court of Minnesota in the case of *Pomeroy v. National City Co.*, 209 Minn. 155 or *Donaldson v. Chase Securities Corp.*, 209 Minn. 165. I now know in a general way the holdings of those cases, and I feel sure there was no discussion of them by the Judiciary Committee nor the said subcommittee in connection with our deliberations on H. F. 1265; nor were the holdings of the Supreme Court of our State with reference to the period of limitations on actions for damages from the sale of securities or for the rescission of sales thereof considered by us.

What our committee and subcommittee had in mind was that persons who had existing claims not barred by limita- [fol. 1912] tions at the time this bill was passed should be given one more full year after the act became law within which to commence suit. I did not intend, and so far as I can tell from anything that was said, no other committeeman I know of intended to revive claims barred by the ordinary six year Statute of Limitations.

I remember the period of limitations being discussed, and that the thought expressed was to give everyone having an existing claim a six year limitation on actions; and then as to those whose claims were more than five years old, but which were not yet barred by the general six year statute, we would allow one full year after our bill was passed and became effective.

So far as I can recall, the legislature itself gave no discussion to or consideration of the Pomeroy and Donaldson decisions in the consideration and passage of H. F. 1265.

The only thing I recall mentioned was that if a claimant had only a month or so to go before his claim was outlawed he ought to have a longer time of a full year in which to start suit.

J. William Hultala, Senator, 61st Legislative District.

Subscribed and sworn to before me this 14th day of Jan., 1944. Donald D. Harries, Notary Public, St. Louis County, Minn. My Commission Expires July 21, 1950. (Notarial Seal.)

[fol. 1913] EXHIBIT C

STATE OF MINNESOTA,
County of Ramsey, ss:

Fred P. Memmer, being first duly sworn, deposes and says that he is a lawyer practicing in St. Paul, Minnesota, and that at all times therein mentioned he was a member of the House of Representatives of the legislature of Minnesota. During the legislative session of the year 1941 he was a member of the Judiciary Committee of the House.

He was one of the men who introduced a bill known as House File 1265 relating to a revision of the Blue Sky Law of Minnesota. The bill was referred to the Judiciary Committee of which he was a member and was discussed at a meeting thereof which he attended. Mr. Robert L. Smith, Jr., Commissioner of Securities, appeared at the meeting and explained all of the provisions of the bill, including Section 18 which deals with a limitation upon actions. In the discussion of the bill no mention was made of decisions in *Pomeroy v. National City Co.*, 209 Minn. 155 and *Donaldson v. Chase Securities Corp.*, 209 Minn. 165, handed down by the Supreme Court on January 10, 1941. At no time was it mentioned that Section 18 or any provision therein was intended to change the law as laid down by the Supreme Court in said cases nor was it mentioned that Section 18 or any provision thereof was drafted for the purpose of reviving any action or claim which the Supreme Court had [fol. 1914] held barred under existing law. No mention was made of the name of any party or persons intended to be affected by the bill when it was discussed in the committee.

Before the bill was introduced in the House, he discussed the measure generally with the Commissioner of Securities, but he does not recall any of the particulars of that discussion except that he sought and obtained a general idea of what the bill was about.

He does not recall attending any meeting of a subcommittee which considered the bill. Normally, there would be no debate of a bill on its first reading. It is merely sent to Committee. He does not recall that there was any debate on the floor of the House when the bill was reported back by the Judiciary Committee and placed upon General Order before its second reading. He does not recall that there was any debate or discussion about the measure when it came

up for a third reading. The bill was an administrative measure, extensive and complex in its terms, and he verily believes that there would have been very little discussion on the floor of the House but that almost all discussion would take place in the Judiciary Committee which is made up entirely of lawyers. All lawyers in the House serve on the Judiciary Committee unless they express a contrary desire. As to those who signed the report of the subcommittee, he is informed and believes that Mr. L. L. Lenertz is now with the F. B. I., Mr. Hagen is in the Army, Mr. Kiefer has died, Mr. George MacKinnon is in the Navy and [fol. 1915] Mr. Huhtala is practicing law on the Iron Range.

Further Affiant Saith Not.

Fred P. Memmer.

Subscribed and sworn to before me this 22nd day of January, 1944. J. F. Seiberlich, Notary Public, Ramsey County, Minn. My commission expires Nov. 19, 1948. (Notarial Seal.)

[fols. 1915a-1918] [File endorsement omitted]

[fol. 1919] IN SUPREME COURT OF MINNESOTA

[Title omitted]

RESPONSE TO PETITION FOR REHEARING—Filed February 7, 1944

At the outset, petitioner is met by the insuperable objection laid down in *Derby v. Gallup*, 5 Minn. 85 (119) that

> "Where a question of law has once been fully discussed on the argument and considered by the court, we cannot admit that a party is entitled to a re-argument on the ground that there is manifest error in the decision."

Plainly, all that is involved here is a question of law, already fully argued. This question, contrary to petitioner's claim, was not incidental, but was exhaustively briefed, and twice prominently presented and argued by two sets of counsel.

The gist of the 80-page petition is contained in the first [fol. 1920] two paragraphs. Its principal grounds are two:

1. Petitioner claims that the former appeal, 209 Minn. 165, 296 N. W. 518, "adjudicated" with finality that plaintiff had no further right of action for violation of the Blue Sky Law, and that the Legislature could not thereafter affect petitioner's "vested" right in such adjudication.

Stated and italicized on page 2 of the petition, the claim now is that

> "the only issue on the 1941 law is: whether the legislature, as to this plaintiff and on the basis of previous litigation in this case, intended to abrogate defendant's vested right adjudged in its favor upon the former appeal, and if so, whether the legislature had the constitutional power to do so."

This contention is without merit. The earlier decision did not extinguish plaintiff's right of action. Petitioner did not thereby acquire any "vested" immunity from liability. Being a *reversal* of a judgment in favor of plaintiff expressly without prejudice to further proceedings, it could not constitute a conclusive adjudication on the merits. Under such circumstances an interim judgment for costs on appeal is not such a final adjudication.

Plaintiff pleaded a single cause of action assertable on several grounds or theories of action (R. 5-49). These included, among others, petitioner's violation of the Blue Sky Law, false implied representation of registration under [fol. 1921] the Blue Sky Law, concealment of the material fact of non-registration, and false implied representation of absence of manipulation of the market. If petitioner's present claim of vested adjudication has merit, it should likewise bar plaintiff's recovery on the implied representation or concealment theories, which were applied by the lower court, following the well-considered case of *Mary Pickford v. Bayley Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102. Petitioner's violation of the Blue Sky Law is an essential ingredient of those theories, under which present wilful intent or scienter, plaintiff's right to recover is complete. The reversal on the first appeal was an interim determination in the course of this litigation and before final decision on the merits that the tolling theory was untenable. It did not wipe out plaintiff's Blue Sky theory or any other

theory supporting plaintiff's cause of action, because the Blue Sky theory might have been sustained as it was in the lower court after reversal on any ground other than tolling.

The reversal on the previous appeal was no more a final adjudication on the merits than the reversal in the Pomeroy appeal of the lower court's order sustaining a demurrer to National City Company's plea of limitations. The decisions on the first appeal in both cases, being judgments for costs, were interim determinations prior to a final adjudication on the merits.

2. Petitioner claims that the court was guilty of manifest error in construing Sec. 18.

[fol. 1922] In this connection it is claimed that certain alleged evidence not offered to the court below would show that there was no affirmative intention on the part of the Legislature to lift the bar of limitations.

This contention is without merit.

(a) As pointed out by the court in its opinion:

> "The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, * * * whether more than six years had elapsed since delivery or not."

(b) Other than the Legislative minutes, the proffered evidence is incompetent. In determining the intention of the Legislature, the intention or motives of individual members cannot be considered. The Legislative minutes are of no help since they are admittedly silent.

PETITIONER HAS NO GROUNDS FOR RE-ARGUMENT OF THIS CASE

I

Effect of Decision on First Appeal

(a) There was no final adjudication on the first appeal that plaintiff was not entitled to recover for violation of the Blue Sky Law, on any of the several grounds pleaded in the complaint and urged at the trial and on appeal. There was no final decision on the merits. Indeed, the case was remanded for final decision on the merits.

[fol. 1923] On the first appeal, petitioner appealed from a judgment in favor of plaintiff. This court reversed the judgment, and said:

> "Our decision in a companion case, *Pomeroy v. National City Co.*, 269 Minn. 155, 296 N. W. 513, is decisive of the only question presented by this appeal and requires reversal of the judgment under review.
>
> "This record indicates the presence of issues other than that of the *tolling* of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result." (Italics ours)

The rule with respect to the effect of a judgment of reversal as a conclusive adjudication has been stated as follows:

> "As a general rule, the judgment of an appellate court reversing a judgment, decree, or order of a trial court does not purport to be final or to pass upon the merits of the controversy, and hence does not operate as *res judicata*, but leaves the parties in the same position as they were before judgment of the lower court was rendered; and this is especially true where the judgment of reversal is 'without prejudice.'"
>
> 34 *C. J.*, Sec. 1192, p. 774.

> "A judgment of reversal which does not purport to be final or to pass upon the merits of the controversy does not operate as *res judicata*."
>
> 34 *C. J.*, Sec. 1309, p. 859.
>
> 1 *Dunnell Minn. Digest*, Secs. 441-443.

Where an appellate court reversed, granting defendant a [fol. 1924] new trial and then dismissed the action because of plaintiff's failure to pay costs, such judgment was held by this court not to be on the merits and therefore not *res judicata*.

> *Kerrigan v. C., M. & St. P. Ry. Co.*, 86 Minn. 407, 90 N. W. 976.

In *Conway v. Elgin*, 38 Minn. 469, this court held that a reversal of a judgment for plaintiff on the pleadings was not a conclusive adjudication requiring judgment in favor of defendant.

In *Steinman v. Clinchfield Coal Corp.*, 121 Va. 614, 93 S. E. 684, it was held that a judgment reversing and remanding a cause in which a judgment for plaintiff was not a conclusive adjudication in favor of defendant.

In *City of Aurora v. West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42, the U. S. Supreme Court said, with reference to a judgment which had been reversed and where the case was remanded for further proceedings:

> "Certainly the reversal of the judgment . . . is not conclusive evidence that the plaintiff may not ultimately recover. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."

The former appeal decided only that the statute of limitations was not tolled by reason of the absence of petitioner, a foreign corporation, from the state while it had a statutory agent for service of process in the state. There was no [fol. 1925] general adjudication in favor of petitioner on the merits. Without such adjudication, the doctrine of *res judicata* could have no application. (34 *C. J.*, Sec. 1193, p. 774.) The earlier appeal did not adjudicate that plaintiff had no cause of action for violation of the Blue Sky Law. It did not extinguish the cause of action. At that point the merits were still undecided. Final decision on the merits depended on further proceedings. Petitioner at that time acquired no "vested" immunity from liability by reason thereof.

It is claimed that the court in its opinion incorrectly stated the issues with respect to Sec. 18 to be (1) whether the Legislature intended to lift the bar as to claims more than five years old, and (2) whether the Legislature had the power to do so. In view of petitioner's statement of the issues in the last paragraph on page 234 of its Main Brief; in language almost identical with that employed by this court we fail to see the merit of this contention. Petitioner's present narrower claim actually presents no different issue from the general claim as formulated by it in its Main Brief. By the decision on the first appeal, petitioner acquired no greater "vested" immunity from liability as to plaintiff than the claimed general immunity as against all other claimants.

(b) Even if there had been a final adjudication on the earlier appeal, the effect thereof would have been only to hold that plaintiff's *remedy* for petitioner's violation of the [fol. 1926] Blue Sky Law was barred. The right of action was not affected, as the statute of limitations operates on the remedy only. The petitioner confuses a statutory bar to the remedy with an adjudicated defense on the merits.

A new promise in writing or partial payment even after a final decision for the debtor on the ground of limitations by an appellate court would life the bar to the creditor's remedy.

See: *Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673 (where after the final judgment for defendant to the effect that the cause of action was barred by limitations, a second action held maintainable on new promise to pay debt involved in the first action).

Petitioner relies on *Rosenquist v. O'Neill & Preston*, 187 Minn. 375, 245 N. W. 621; *Johnson v. Jefferson*, 191 Minn. 631, 255 N. W. 87; and *Terres v. International Fuel Co.*, 208 Minn. 259, 293 N. W. 301.

These cases are clearly distinguishable. In each this court dealt with awards made by the Industrial Commission under Sec. 4295, under which it was given the power to determine whether an employer is subject to "further liability for payment of compensation."

In the *Rosenquist* case, this court said that the effect of the Commission's determination under Sec. 4295 is that "the *right* is at an end" (p. 378).

In the *Johnson* case, this court held that the prior proceedings of the Commission under Sec. 4295 "fixed and finally determined the *rights* of the parties" (p. 633). The decision [fol. 1927] that "the relators' rights became fixed and vested," and that the Legislature had no power thereafter to grant a re-hearing is based on the theory that both the right and the remedy were finally terminated under Sec. 4295.

To the same effect is *Terres v. International Fuel Company, supra*, where this court said at page 262:

"Under section 4295, the award thus made terminated the *right* to compensation."

In these cases the problem presented was whether the Legislature had power to revive a substantive right held to be extinguished by Sec. 4295. More than the remedy was involved in each case.

These cases are analogous to *Negaubauer v. G. N. Ry. Co.*, 92 Minn. 184, 99 N. W. 620, and *Kannellos v. G. N. Ry. Co.*, 151 Minn. 157, 186 N. W. 381, cited and distinguished in paragraph 4 of the court's opinion, where this court said that where the limitation was contained in the statute which created the right and operated to extinguish the right as well as the remedy, and that the Legislature in such cases had no power to lift the bar.

The *Rosenquist*, *Johnson* and *Terres* cases fall into the same category as the *Negaubauer* and *Kannellos* cases. This explains the holding in *Johnson v. Jefferson*, *supra*, that

> "The rights of the relators had become finally determined and fixed prior to the passage of the amendment of 1933, and that it was beyond the power of the legislature to authorize the Commission to reopen the case" (p. 635).

[fol. 1928] Here, however, we are dealing with a remedy situation described in *In re Estate of Daniel*, 208 Minn. 420, at page 429, 294 N. W. 465, where this court said at page 429:

> "A general statute on limitations does not condition rights. It simply prescribes the time within which rights may be enforced. Hence it relates to the remedy only."

To the same effect see *Kannellos v. G. N. Ry. Co.*, *supra*, at page 159:

> "The case of *Campbell v. Holt* . . . is not such a case, for there an ordinary limitation statute was involved, and not one like that in the case at bar."

Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001, relied on by petitioner, involved a note which had already merged into a judgment, thereby extinguishing the note. The judgment was partially paid after it was outlawed. The statute with respect to partial payment was held not applicable to judgments.

Here, the obligation of petitioner was never satisfied, merged or extinguished.

(c) Petitioner claims that in effect this court held that the Legislature attempted to reverse the decision of this court on the first appeal.

The holding of the first appeal on the tolling question was not reversed by Sec. 18. The law with respect to tolling is unchanged.

(d) Sec. 18, as the court held in its opinion, was intended to apply to pending litigation as well as to outstanding [fol. 1929] claims which were permitted to be asserted within one year. Petitioner had no greater "vested" immunity from liability to plaintiff by reason of the decision in the first appeal than it had from liability on any other outstanding claims.

See: *Robinson v. Robins Dry Dock & Repair Co.*, quoted in this court's opinion, 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310 Reargument denied, 239 N. Y. 504, 147 N. E. 171. Petition for writ of error dismissed, 271 U. S. 649, 46 S. Ct. 636, 70 L. Ed. 1131.

See also: *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495.

(e) The claim of vested adjudication was raised by petitioner on the appeal.

In its Re-Brief (p. 45), it asserted that

> "The relative rights of the parties on that issue were then adjudicated and fixed permanently."

II

As to Construction of Chapter 547, Section 18

(a) In rendering its decision, this court was rightly of the opinion that the plain meaning of Sec. 18 required a holding that the Legislature intended to lift the bar of limitations as to causes of action more than five years old. As this court said, the fact that the Legislature failed to include the words "but less than six years old" is conclusive on the question of statutory interpretation.

[fol. 1930] (b) Petitioner claims that the court's deductions on the motivation of the Legislature in passing Sec. 18 are not tenable, because

(1) the legislative records are silent with respect to intention to lift the bar, and

(2) proffered testimony of two members of the Legislature and of the Securities Commissioner would show that *they* had no such intention.

Plaintiff responds:

(1) The offered proof is not timely.

Smith v. St. Paul, 69 Minn. 276, 72 N. W. 104, 210.

(2) The information is not newly discovered. It had always been available to petitioner. No effort was made to make offer of proof or to present the matter to the trial court.

(3) In any event, the whole offer of proof is incompetent. The minutes of the Legislature, admittedly silent, furnish no basis for drawing of the inference claimed by petitioner. But what is more important, the offer of proof in this respect violates the well settled rule that "in determining the intention of the Legislature, the intention or motives of individual members cannot be considered."

6 *Dunnell's Minn. Dig.*, Sec. 8941;
Jewell v. Weed, 18 Minn. 272 (247);
State v. City of Lake City, 25 Minn. 404;
[fol. 1931] *State ex rel. Rose Bros. v. Clousing*, 198 Minn. 35, 268 N. W. 844;
Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145;
2 *Lewis-Sutherland Statutory Construction*, Sec. 496;
McQuillin, Municipal Corporations (2d Ed.), Sec. 739.

Petitioner's authorities with respect to admissibility of official reports of Legislative Committees have no bearing at all on the competency of the motives or intention of individual legislators.

See: *People v. McElroy*, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609.

In the *Soon Hing case, supra*, the correct rule governing statutory construction was stated as follows:

"The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the

Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. *The diverse character of such motives,* [fol. 1932] *and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.*"

This court construed Sec. 18 in accordance with its plain language. Whatever inferences it drew as to motives of the Legislature, were based upon the language disclosed on the face of the Act or such as were inferable from its operation.

Ohio Bell Telephone Co. v. Public Utilities Commissioner, 301 U. S. 292, 81 L. Ed. 1093, relied on by petitioner, involves the fixing of rates. It is in no way comparable to the question of statutory construction here decided. The court could not, even if it wanted to, conduct or direct a hearing on what the individual Legislators had in mind. Such a proceeding would have the attributes of novelty, but would otherwise be meaningless and futile.

Granted, for the sake of argument, that the original sponsors of this legislation had as their motives a different scheme to accomplish, the same motives cannot be imputed to the Legislature as a whole which had a right to interpret the plain and unambiguous language as this court did. After all "the best-laid schemes o' mice and men gang aft a-gley."

It may well be argued that had this proviso contained the words "and not more than six years" after the words "more than five years," the whole effort to pass the new limitations statute hastily during the last days of the Legislative session might have been abortive. In the usual Legislative "give [fol. 1933] and take" the issuers of the securities were given a new statute of limitations, and the investors who had been wronged by the violations of the Blue Sky Law and whose remedies would otherwise have been cut down by the amendment were given time to assert or reassert their claims.

In the last analysis, petitioner has merely reiterated its dissent from what it chooses to call "the old and discredited case of *Campbell v. Holt*" (Petition, p. 53). *Campbell v. Holt*, decided December 7, 1885, is not as old as *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. 957, decided January 7, 1884, by Mr. Justice Mitchell, which, although it laid down the same principles, has never been discredited. On the contrary, *Campbell v. Holt* has been followed with approval by many courts (see Respondent's Brief, pp. 30-32). The Federal Courts give it uniform approval. The reasoning of *Campbell v. Holt* was recently clarified by Judge Clark, in *Pittsburgh Can Co. v. U. S.* (C. C. A. 3), 113 Fed. (2) 821, as follows:

> "The flaw seems to lie in a straining in favor of 'law Latin' and against plain English. This straining proceeds, as we have indicated from some notion of hardship. That notion of hardship proceeds in its turn from a sentimental but illogical analysis of the purposes of statutes of limitation. Those statutes confer no vested rights. They are *ex gratia* to the individual to protect him from perjury and they benefit the public by accelerating litigation. There is no unfairness in retrospectively removing something that was only a shield. As was said by a Supreme Court Justice a good [for] 1934] many years ago: '* * * No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made.' *Campbell v. Holt*, 115 U. S. 620, 628, 6 S. Ct. 209, 213, 29 L. Ed. 483."

III

Petitioner's Contention That Plaintiff's Claim Is a Statutory Action

This contention was exhaustively presented (see Donaldson Respondent's Brief, pp. 50-57, and Re-Brief, p. 12; Pomeroy Respondent's Brief, pp. 9-28). Petitioner seeks to re-argue what has already been fully presented.

Drees v. Minnesota Petroleum Co., 189 Minn. 608, 611, 250 N. W. 563, 565.

IV

Other Subsidiary Points Are Urged in Support of the Petition for Re-Hearing

It is claimed that the title of Chapter 547 is fatally defective in failing to disclose that it dealt with the lifting of the bar. The title of the Act expressly states that it deals with limitations. All of Sec. 18, including the proviso, is germane to that subject.

The other constitutional objections raised relate to the [fol. 1935] basic contention that the Legislature was without power to lift the bar. This court has clearly indicated its views on that question.

In our opinion, no valid ground has been presented for granting a re-hearing.

Respectfully submitted, Leonard, Street & Deinard, George B. Leonard, Hyman Edelman, 1036 Andrus Building, Minneapolis Minnesota; S. P. Gislason, New Ulm, Minnesota, Attorneys for Respondent.

[fol. 1936] IN SUPREME COURT OF MINNESOTA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 23, 1944

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully, Grace Kaercher Davis, Clerk Supreme Court.

[fol. 1937] IN SUPREME COURT OF MINNESOTA

33458

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., Executors of the Estate of Ruth Chase Donaldson, Deceased, substituted as respondents, Respondents,

vs.

CHASE SECURITIES CORPORATION, a corporation, now known as Amerex Holding Corporation, Appellant

JUDGMENT—February 23, 1944

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents herein, do have and recover of appellant herein the sum and amount of Three Hundred Eighty-seven and 43/100 Dollars, ($387.43) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 23, 1944.

By the Court. Attest: Grace Kaercher Davis, Clerk.

[fol. 1938] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM SUPREME COURT OF STATE OF MINNESOTA TO UNITED STATES SUPREME COURT—Filed April 22, 1944

To the Chief Justice of the Supreme Court of the State of Minnesota:

Chase Securities Corporation, now known as Amerex Holding Corporation, appellant, pursuant to Section 237-(a) of the Judicial Code, as amended by the Act of February

13, 1925 (28 U. S. C. A., Section 344(a)) and Rules 9, 10, 12, 36 and 46 of the Rules of the Supreme Court of the United States, as amended, hereby prays an appeal from [fol. 1939] the judgment of the Supreme Court of the State of Minnesota, entered in the above entitled cause on February 23, 1944, affirming the judgment in said cause of the District Court, Fourth Judicial District, State of Minnesota, to the Supreme Court of the United States, and further prays that an order be entered fixing the amount of bond and security to be given by defendant as appellant and conditioned as the law directs and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

If this petition, in the judgment of the Supreme Court of the United States, is improvidently sought and allowed as an appeal when the proper mode for review is by a petition for certiorari, then appellant prays that this petition and its related documents be regarded and acted upon as a petition for certiorari, pursuant to the provisions of Section 237 (c) of the Judicial Code, as amended by the Act of February 13, 1925 (being the same as 28 U. S. C. A., Section 344(c)).

The petition is presented for the reasons set forth in appellant's Assignment of Errors, filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and upon the Jurisdictional Statement, filed herewith pursuant to Rules 12 and 46 of said Rules.

The appellant respectfully shows to this Court:

1. *Summary Statement of Case:*

An action was commenced in November, 1937, to recover the purchase price of combined stock of appellant and Chase National Bank of New York sold by appellant to appellees' [fol. 1940] testate * in August, 1929. Recovery was claimed on two grounds: first, alleged breach of the Minnesota Securities Law, for failure to register the stock under that law prior to the sale; and, second, common law fraud in sale representations. The trial occurred in 1939. In 1940, the trial court adjudged that appellant had breached the registration statute, and that the action was not barred

* While the second appeal in the state court was pending, the plaintiff died and appellees were substituted as her representatives. The designation "appellee" is here used.

because the six-year statute of limitations had been tolled by withdrawal of appellant, pursuant to statute, from Minnesota in 1931. The fraud claim was not decided.

On appeal, the Minnesota Supreme Court on January 10, 1941, reversed the trial court judgment and held that such cause of action was barred by the six-year statute of limitations because such statute had not been tolled, *Donaldson v. Chase Securities Corporation*, (1941) 209 Minn. 165, 296 N. W. 518, which followed the companion case on the same question, *Pomeroy v. National City Co.*, (1941) 209 Minn. 155, 296 N. W. 513. Judgment of reversal on the statutory cause of action was entered accordingly, and the case was remanded for consideration of the remaining issue of fraud.

After remand and while appellee's motion for findings on the fraud issue was pending, the Minnesota legislature on April 22, 1941, passed Section 18, Chapter 547, Laws of Minnesota, for 1941 (see text in Section II of the Jurisdictional Statement, filed herewith) which created a six-year limitations period specifically applicable to Blue Sky Law actions. It contained a proviso that, if prior to the effective [fol. 1941] date of the act (July 1, 1941) more than five years had elapsed from the date of delivery of a security, an action could be brought within a period of one year following that effective date.

Appellee then filed a supplemental motion and reasserted the statutory cause of action, claiming that it had been revived by the 1941 law. Appellant made prompt objection to such claim, on two grounds:

> (a) that the Minnesota legislature did not intend to revive causes of action already barred and especially one, such as this, where the state supreme court had already specifically held in this very case that the action was barred;
>
> (b) that the Minnesota legislature did not have the power under the due process clauses of the state and federal constitutions to abrogate a final judgment of the state supreme court and to revive a statutory cause of action for breach of the securities law, which cause no longer existed under the previous law.

The trial court overruled both grounds of appellant's objections, denied its motion for new trial, and entered

judgment for appellee in June, 1942, on the statutory cause of action, as well as on the fraud claim.

On appeal to the state supreme court from this judgment, appellant seasonably challenged to lower court decision and, on petition for rehearing, the decision of the supreme court thereon, upon these grounds:

(1). The 1941 law, if so construed and applied in this case, abrogates appellant's vested right in the judgment of the state supreme court in the prior appeal in the same case, and thereby deprives appellant of its property in violation of the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States.

(2). The 1941 law, if so construed and applied in this case revives a stautory cause of action where the limitations [fol. 1942] period for assertion of such cause has expired, and thereby deprives appellant of its property in violation of the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States.

(3). The 1941 law, if so construed and applied in this case, constitutes class or special legislation against appellant, and thereby denies appellant the equal protection of the laws in violation of the equal protection clause of Section One of the Fourteenth Amendment to the Constitution of the United States.

(4). Appellant, having been denied a new trial after the enactment of the 1941 law and the opportunity to submit evidence which would show complete absence of any legislative intent to revive already barred statutory causes of action, was denied a fair trial, as guaranteed by the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States.*

The Minnesota Supreme Court, upon an opinion rendered December 31, 1943, and an order without opinion, dated February 23, 1944, denying a rehearing, overruled each of

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* This fourth ground may also be considered upon appeal, as authorized by *Prudential Insurance Co. v. Cheek*, (1921) 259 U. S. 530, at 547, 66 L. Ed. 1044, 42 S. Ct. 516, and *Flournoy v. Wiener*, United States Supreme Court case No. 252, amendatory opinion rendered March 27, 1944, and not yet printed in the official reports.

the contentions and entered judgment of affirmance on February 23, 1944. It is a review of this judgment that is sought by this appeal.

2. *Judgment of Highest State Court:*

The judgment is a final judgment of the Supreme Court of the State of Minnesota, which is the highest court of that state in which a decision can be had.

3. *Date of Judgment Sought to Be Reviewed:*

The judgment sought to be reviewed by this petition was [fol. 1943] entered by the Supreme Court of the State of Minnesota on the 23rd day of February, 1944. This application for appeal is presented on the 22 day of April, 1944.

4. *General Ground for Appeal:*

The appellant, by objection promptly made and preserved, drew in question the validity of the 1941 Minnesota statute on the grounds above stated. The decision of the Minnesota Supreme Court construed and applied the law contrary to appellant's contentions and sustained its validity. It presents substantial federal questions, as shown in the Jurisdictional Statement filed herewith.

Wherefore, appellant prays that this petition be allowed, pursuant to the provisions of Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Dated: April 21, 1944.

Chase Securities Corporation, now known as Amerex Holding Corporation, Appellant, by E. H. Stinchfield, S. S. Jennings, Jr., Counsel for Appellant.

John M. Palmer, Floyd E. Nelson, of Counsel.

[fol. 1944] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 22, 1944

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final judgment made

and entered on February 23, 1944, in the above entitled suit by the Supreme Court of the State of Minnesota, being the highest court of the state in which a decision in the suit could be had, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made [fol. 1945] and provided, wherein it appears that there is drawn in question the validity of Section 18, Chapter 547, Laws of Minnesota for 1941, on the ground that said Law, as construed and applied by the said Supreme Court of the State of Minnesota, deprives appellant of its property without due process of law in violation of the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States, and denies appellant the equal protection of the laws in violation of the equal protection clause of Section One of the Fourteenth Amendment to the Constitution of the United States, and that the final judgment and decree of said court was in favor of the validity of said Law.

It Is Now Hereby Ordered, pursuant to the provisions of Section 999 of the Revised Statutes (being the same as 28 U. S. C. A., Section 868), and Rules 9, 10, 12, 36 and 46 of the Rules of the Supreme Court of the United States, as amended, that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota, entered in the above entitled cause, on February 23, 1944, affirming the judgment in said cause of the District Court, Fourth Judicial District, State of Minnesota, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Minnesota and the Clerk of said District Court, Fourth Judicial District, State of Minnesota, to which court the record has been remitted, shall within forty (40) days from this date, prepare, certify and transmit to the Supreme Court of the United States a true copy of the material parts of the transcript of the record, proceedings and judgment in this cause, which shall be designated by praecipe or stipulation of the parties or their counsel herein in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 1946] It Is Further Ordered that the supersedeas bond on said appeal be fixed and filed in the sum of Five

Thousand Dollars ($5,000.00), pursuant to Sections 1000 and 1007 of the Revised Statutes (28 U. S. C. A., Sections 869 and 874) and Rule 36 of the Rules of the Supreme Court of the United States, and that, upon the filing of said bond, the execution and enforcement of said judgments be and they hereby are stayed until final determination of said cause in the Supreme Court of the United States.

Dated: April 22, 1944.

Charles Loring, Chief Justice of the Supreme Court of the State of Minnesota.

[fols. 1947-1953] Supersedeas Bond on Appeal for $5,000.00 approved and filed April 22, 1944; omitted in printing.

[fol. 1954] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 22, 1944

Appellant, having this day filed its Petition for Appeal and Jurisdictional Statement in the above entitled cause, files the following Assignments of Errors on which it will rely on its appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Minnesota, entered herein on the 23rd day of February, 1944:

The Court erred:

1. In holding, contrary to the timely contention of appellant, that Section 18, Chapter 547, Laws of Minnesota for [fol. 1955] 1941, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of section One of the Fourteenth Amendment to the Constitution of the United States.

2. In holding, contrary to the timely contention of appellant, that said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of Fourteenth Amendment to the Constitution of the United States, even though such

construction results in the abrogation of a previous adjudication of the Supreme Court of the State of Minnesota between the same parties in the same case, *Donaldson v. Chase Securities Corporation,* (1941) 209 Minn. 165, 296 N. W. 518, which held that appellee's cause of action for appellant's breach of the Minnesota Securities Law was barred by the Minnesota statute of limitations.

3. In holding, contrary to the timely contention of appellant, that said Law, as construed and applied in this case, does not deprive appellant of its property without process of law in violation of the Fourteenth Amendment to the Constitution of the United States, even though such construction results in the revival of a statutory cause of action for breach of the Minnesota Securities Law which had become barred by the Minnesota Statute of Limitations.

4. In holding contrary to the timely contention of appellant in its Petition for Reargument, that said Law, as construed and applied in this case, does not deny appellant the equal protection of the laws in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

5. In holding, contrary to the timely contention of 1941, [Fol. 1956] as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of section One of the Fourteenth Amendment to the Constitution of the United States.

2. In holding, contrary to the timely contention of appellant, that said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of Fourteenth Amendment to the Constitution of the United States, even though such construction results in the abrogation of a previous adjudication of the Supreme Court of the State of Minnesota between the same parties in the same case, *Donaldson v. Chase Securities Corporation,* (1941) 209 Minn. 165, 296 N. W. 518, which held that appellee's cause of action for appellant's breach of the Minnesota Securities Law was barred by the Minnesota statute of limitations.

3. In holding, contrary to the timely contention of appellant, that said Law, as construed and applied in this case, does not deprive appellant of its property without process

of law in violation of the Fourteenth Amendment to the Constitution of the United States, even though such construction results in the revival of a statutory cause of action for breach of the Minnesota Securities Law which had become barred by the Minnesota Statute of Limitations.

4. In holding, contrary to the timely contention of appellant in its Petition for Reargument, that said Law, as construed and applied in this case, does not deny appellant the equal protection of the laws in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

5. In holding, contrary to the timely contention of appel- [fol. 1957] lant in its Petition for Reargument that said Law, as construed and applied in this case, does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, even though such construction results in class or special legislation which was found by the Court to have been specifically intended to impose liability upon appellant and one other corporation and in favor of the purchasers of stock from these specific corporations.

6. In holding, contrary to the timely contention of appellant, that appellant was not entitled to a trial, as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States, of the vital issue of intent of the state legislature, on which issue the Court found without trial that the legislature specifically intended to reverse a rule of law already declared by the Court in appellant's favor in this very case, and to impose liability upon appellant and in favor of the owners of a particular stock sold by appellant contrary to the previous final adjudication between the parties in this case.*

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* A ground of error, not itself a basis for appeal but includable as error to be assigned on appeal from a judgment sustaining the validity of a state statute against a claim of unconstitutionality. *Prudential Insurance Co. v. Cheek*, (1921) 259 U.S. 530, at 547, 66 L. Ed. 1044, 42 S. Ct. 516, and *Flournoy v. Wiener*, United States Supreme Court Case No. 252, amendatory opinion rendered March 27, 1944, and not yet printed in the official reports.

7. In affirming the judgment of the lower court from which the appeal was taken.

[fols. 1958-2035] Wherefore, appellant prays that the said judgment of the Supreme Court of the State of Minnesota be reversed, that a judgment be rendered in favor of appellant, and that appellant have and recover its costs of this appeal.

Respectfully submitted, F. H. Stinchfield, S. S. Jennings, Jr., Counsel for appellant.

John M. Palmer, Floyd E. Nelson, Of Counsel.

[fols. 2036-2132] Citation in usual form, filed April 22, 1944, omitted in printing.

[fol. 2133] Supreme Court of the United States

[Title omitted]

Praecipe for Transcript of Record—Filed May 10, 1944

To Grace Kaercher Davis, Clerk of the Supreme Court of the State of Minnesota:

You are hereby requested to make and certify a transcript of record and transmit the same to the Clerk of the Supreme Court of the United States, under your hand and seal, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, not later than the return day named in the [fol. 2134] Citation herein, dated April 22, 1944, which return day is within forty (40) days from and after April 22, 1944.

You are hereby requested to incorporate into such transcript of the record the following portions of the record in the above case:

1. The Opinion of the Supreme Court of the State of Minnesota, dated January 10, 1941, in the case of *Donaldson v. Chase Securities Corporation*, reported in 209 Minn. 165;

2. The Opinion of the Supreme Court of the State of Minnesota dated January 10, 1941, in the companion case of *Pomeroy v. National City Company*, reported in 209 Minn. 155;

3. The Judgment of the Supreme Court of Minnesota, entered in the case of *Donaldson v. Chase Securities Corporation*, on March 7, 1941, upon the opinion of said court rendered on January 10, 1941, being Item No. 1, above;

4. The complete Volumes Numbered I and II of the record, as printed for use of the Supreme Court of the State of Minnesota on appeal from the District Court to said court and filed in your office on March 31, 1943;

5. The Assignments of Error urged by appellant on appeal from the District Court to the Supreme Court of the State of Minnesota, as printed in the Appendix of Appellant's Brief, pp. Apx. 1 to Apx. 48, inclusive, which Appellant's Brief was filed in your office on March 31, 1943;

6. The Opinion of the Supreme Court of the State of Minnesota herein, dated December 31, 1943;

7. The Opinion of the Supreme Court of the State of Minnesota in the companion case of *Pomeroy v. National City Company*, dated December 31, 1943;

8. The Petition for Rehearing, filed by appellant in your office on January 28, 1944;

9. The Order of the Supreme Court of the State of Minnesota, dated February 23, 1944, denying the Petition for Rehearing;

[fol. 2135] 10. The Judgment and Mandate of the Supreme Court of the State of Minnesota, dated February 23, 1944;

11. All other documents and papers filed in your office by either party subsequent to December 31, 1943;

12. This praecipe and proof of service of a copy thereof on counsel for appellee.

Said transcript is to be prepared as required by law and the Rules of the Supreme Court of the United States.

Dated: May 10th, 1944.

(S.) E. H. Stinchfield, S. S. Jennings, Jr., Counsel for Apellant.

(S.) John M. Palmer, Floyd E. Nelson, Of Counsel.

[fol. 2135a] [File endorsement omitted]

[fol. 2136] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2137] SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS UPON WHICH APPELLANT INTENDS TO RELY—Filed June 12, 1944

Comes now the Appellant, pursuant to Rule 13, Paragraph 9, of the Rules of this Court, and adopts its Assignment of Errors already on file herein as its Statement of the Points Upon Which It Intends To Rely on this appeal.

Dated: June 10, 1944.

Respectfully, F. H. Stinchfield, S. S. Jennings, Jr., Counsel for Appellant.

[fol. 2138] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 12, 1944

Comes now the Appellant, pursuant to Rule 13, paragraph 9, of the Rules of this Court, and designates for printing the whole of the record, as filed, *excepting* the following parts which appellant believes are unnecessary for the consideration of the case:

Part of Record	*Page in State Court Printed Record*
Notice of Motion to Quash Service	17–18
Motion to Quash Service, Affidavit of John M. Palmer, and attached Exhibits A, A-1, A-2, B, B-1 and C	18–40
[fol. 2139] Affidavit of Ruth Chase Donaldson in Answer to Motion to Quash Service	40–41
Affidavit of T. O. Streissguth in Answer to Motion to Quash Service	42–44
Order Denying Motion to Quash Service	44–45
Notice to Produce	65–77
Notice to Produce	78–81
Portions of matter from Plaintiff's Exhibits A-56 and A-57, read into the record by plaintiff's counsel, beginning on State Court Printed Record, Page 394, at paragraph next after folio number 1181, and ending on State Court Printed Record, Page 537, at folio number 1669.	

Defendant's motion to strike certain evidence, beginning on State Court Printed Record, Page 571, at middle of page, and ending on page 581, at middle of page.	
Stipulation In Reference To Plaintiff's Exhibits A-56 and A-57	581–583
Stipulation	583–584
Duplicate Index on pages I to XVIII, inclusive, of Volume II of State Court Printed Record	
Stipulation for Reduction of Record in the State Court	587–619
All of Plaintiff's (Appellee's) Exhibits A to Z, inclusive, and A-1 to A-61, inclusive:	621–1011
All of Defendant's (Appellant's) Exhibits 1 to 16-T, inclusive	1013–1059
Stipulation and Order Extending Stay	1162–1163
Stipulation and Order Extending Stay	1215–1216
[fol. 2140] Notice of Appeal in State Court	1220
Supersedeas Bond and Approvals in State Court	1221–1223

Dated: June 10, 1944.

Respectfully, F. H. Stinchfield, S. S. Jennings, Jr., Counsel for Appellant.

[fol. 2140a] [File endorsement omitted.]

[fol. 2141] Supreme Court of the United States, October Term, 1944

No. 110

Order Noting Probable Jurisdiction—October 9, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 48,541. Minnesota, Supreme Court. Term No. 110. Chase Securities Corporation, now known as Amerex Holding Corporation, Appellant, vs. Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, Deceased. Filed May 29, 1944. Term No. 110 O. T. 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

JURISDICTIONAL STATEMENT.

F. H. STINCHFIELD,
S. S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant, having this day filed its Petition for Appeal and Assignment of Errors in the above entitled cause for an appeal from the judgment of the Supreme Court of the State of Minnesota, entered herein on the 23rd day of February, 1944, presents the following statement, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, showing that the Supreme Court of the United States has jurisdiction to review said judgment on

appeal and that such jurisdiction should be exercised in this case:

I.

Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this court is invoked under Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 344(a)), and, also, in the alternative, under Section 237(c) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 344(c)), as a petition for certiorari, if the case is not the proper subject of a petition for appeal under said Section 237(a).

II.

The Minnesota Statute Whose Validity Is Involved.

Minnesota Statutes, 1941, Section 80.26 was passed as Section 18, Chapter 547, Laws of Minnesota for 1941, being a part of a general revision of the Minnesota Securities Law. It provides:

> "3996-24. Other actions or prosecutions not limited. No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, *provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then*

such action may be brought within a period of one year following such effective date, and provided further that no purchaser of a security otherwise entitled thereto shall bring any action for relief of the character above set forth who shall have refused or failed, within 30 days after the receipt thereof by such purchaser, to accept a written offer from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of repayment, such interest to be computed at the same rate as the fixed interest or dividend rate, if any, provided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser on such securities. Any written offer so made to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commissioner of securities prior to the delivery thereof to such purchaser.

Nothing in this section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the state to punish any person for any violation of law."

The judgment from which this appeal is taken is based particularly upon the portion of the above statute which is here italicized.

III.

Date of Judgment Sought to Be Reviewed and Date On Which Application for Appeal Is Presented.

The judgment sought to be reviewed by this petition was a final judgment, entered by the Supreme Court of the State of Minnesota on the 23rd day of February, 1944. The Supreme Court of the State of Minnesota is the highest court of that state in which a decision can be had.

This application for appeal is presented on the 22d day of April, 1944.

IV.

The Nature of the Case and Rulings of the Court On Federal Questions.

1. *General Nature.*

The action was brought in District Court, Fourth Judicial District, State of Minnesota, in November, 1937, to recover the purchase price of certain combined shares of stock of appellant (then known as Chase Securities Corporation) and The Chase National Bank of the City of New York, which were sold by appellant to appellees' testate [1] in Minneapolis on August 10, 1929. The suit was based on two separate grounds; first, that the sale of the security, without registration under the Securities Law of Minnesota (Chapter 80, Minn. Stat. 1941, then known as Sec. 3996-1 to 28, Mason's 1927 Minn. Stat.), was in violation of that law and void, and second, that appellant committed common law fraud in sale misrepresentations.

2. *Rulings of Trial Court and Prior Appeal to Minnesota Supreme Court.*

The case was tried by the court without a jury in the late spring of 1939, on both general grounds. On April 18, 1940, the trial court made findings of fact and conclusions of law on the one issue only of statutory violation, holding that the stock was subject to the registration provisions of the Minnesota Blue Sky Law; that such law was violated by failure to register the stock; and that the six year statute of limitations, expressly covering actions

[1] While the second appeal in the state court was pending, the plaintiff died and appellees were substituted as her representatives. The designation "appellee" is here used.

"upon a liability created by statute" (Mason's 1927 Minn. Stat., Sec. 9191, subdiv. 2, see text in Appendix A, p. 29) had been tolled by the withdrawal of appellant from Minnesota in 1931, even though such withdrawal had been effected in accordance with the applicable Minnesota statutes. (See Findings of Fact, Conclusions of Law and Order for Judgment, dated April 18, 1940).

From the judgment entered on these findings on June 18, 1940, appellant appealed to the Supreme Court of the State of Minnesota.

On January 10, 1941, that court reversed the trial court judgment, holding (by reference to the companion case of *Pomeroy* v. *National City Company*, 209 Minn. 155, 296 N. W. 513, see opinion in Appendix B, p. 29,) that the cause of action, predicated upon a violation of the registration provisions of the securities law, had been barred by such six year statute of limitations, and that the withdrawal of appellant from Minnesota (having left agents for service of process as required by the Minnesota Corporation and Blue Sky Laws) did not toll the statutory period. A judgment reversing the trial court judgment of June 18, 1940 was entered by the State Supreme Court on March 7, 1941, and the case was remanded for determination of the remaining issue of fraud. *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518.[2] (See opinion in Appendix C, p. 40 and judgment of reversal and mandate in Appendix D, p. 41.)

[2] On the authority of this judgment of the Minnesota Supreme Court, this Court reversed the decision of the Circuit Court of Appeals for the Eighth Circuit on the same question in *Joseph H. Vogel* v. *Chase Securities Corporation*, 110 F. (2d) 607, and remanded the case "for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases." *Chase Securities Corporation* v. *Vogel* (1941), 312 U.S. 666, 85 L. Ed. 1110, 61 S. Ct. 823.

3. Rulings of Trial Court After Remand

On April 9, 1941, appellee filed a motion in the trial court "for an order supplementing and correcting" the previous findings of April 18, 1940, with reference only to the claim of fraud. (See motion of appellee, dated April 9, 1941).

While such motion was pending and on April 22, 1941, the Minnesota legislature enacted a general revision of the Blue Sky Law, known as Chapter 547, Laws of 1941, which became law on April 28, 1941. Section 18 thereof, although entitled as an amendment of Section 3996-24, Mason's 1927 Minn. Stat., was substantially a new section providing a specific statute of limitations for Blue Sky actions. It is quoted above, in Section II of this Jurisdictional Statement.

The parties in May, 1941, then served and filed cross-motions for amended findings, appellee moving that the findings be amended to include an additional paragraph to the effect that appellee's cause of action, based on a violation of the Blue-Sky law, was "revived" by the above mentioned 1941 Statute (see Appendix E, p. 43.)

Appellant made appropriate motion for findings in its favor and objected specifically to this proposed finding of revival, upon the ground that the statutory cause of action had already been adjudged barred by the State Supreme Court in this very case under the then existing statute of limitations, and that the 1941 law did not apply to this case and could not revive such barred action (See Appendix F, p. 44).

The above motions and these grounds specifically, were argued at length to the trial court, orally and by brief.

The trial court, on June 27, 1942, filed findings of fact and conclusions of law for appellee, and, on the reasserted

cause of action for statutory violation, found (third paragraph of Finding XXXII):

> "In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, Secs. 3996-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota."

Appellant on September 8, 1942, moved for amended findings of fact and conclusions of law, or a new trial as follows:

(a) To amend the court's finding as to the 1941 law by striking out the entire paragraph XXXII and conclusions of law and substituting in lieu thereof a conclusion of law that the action was barred and not revived by the 1941 law, upon these grounds: that there was no competent evidence to support such finding of fact or conclusions of law, that the cause of action, if any, for violation of the securities law was barred by the final adjudication of the State Supreme Court in this very case, that the cause of action was barred by the applicable statute of limitations, that the 1941 law could not apply to this case and did not and could not revive the barred cause of action, and if so applied, it would deprive appellant of its property without due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution; and upon the errors in the findings of fact and conclusions of law that the 1941 Statute applied to and revived the cause of action upon the same grounds (See Appendix G, P. 45.)

These alternative motions, including the grounds above summarized and specifically set forth in Appendix G, were argued to the trial court, orally and by memorandum. However, they were denied in their entirety (See order, dated November 18, 1942), and judgment for appellee was entered on November 25, 1942.

4. *The Second Appeal to Minnesota Supreme Court, Resulting In Judgment Upon Which This Appeal Is Based.*

On the second appeal to the Supreme Court of Minnesota, appellant assigned as errors: the denial of appellant's alternative motions for amended findings of fact, conclusions of law and order for judgment, or for a new trial in its favor; the making of Finding of Fact XXVII to the effect that the 1941 statute applied and extended the appellee's time to bring the action; and the denial of appellant's motion to strike said finding and conclusions of law based thereon, or for a new trial; and the denial of appellant's motion to substitute a conclusion of law that the action was barred and not revived by the 1941 law (See Appendix H, p. 48.

These assignments of error, summarized above and specifically set forth in Appendix H, were argued in the briefs of both parties. Appellant stressed specifically the absence of legislative power, under the due process clause of both state and federal constitutions, to revive a barred cause of action, especially where the State Supreme Court had already adjudged that appellee's cause of action for violation of law no longer existed.

The State Supreme Court rendered its decision on December 31, 1943, a copy of which is attached as Appendix I, p. 50. It held: (a) that appellant's failure to register the stock in Minnesota in 1929 constituted a violation of the securities law, (b) that the legislature had in mind this

appellant and its sales of stock in this state in 1929 and specifically intended to overcome the effect of the decision on the prior appeal in this case and in the companion case of *Pomeroy* v. *National City Co.*, and to allow purchasers of such stock one year from July 1, 1941, to commence suits against this appellant on causes of action for statutory violation as to sales of this particular stock, and (c) that the legislature had the power under the due process clauses of both state and federal constitutions to revive plaintiff's cause of action in this very case, already declared barred by the court on the prior appeal. The principal authority cited for these conclusions was the case of *Campbell* v. *Holt*, (1885) 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, concerning which the Minnesota Supreme Court said, in part:

> "We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court".

The opinion said that the rule of the case of *Danzer & Co., Inc.* v. *Gulf & Ship Island Ry. Co.*, (1925) 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612, was not applicable.

The decision was based solely on this one issue. Judgment for appellee for the purchase price of the stock was affirmed.

Appellant filed a petition for rehearing, wherein it again contended that the statute, as so construed by the court, denied appellant its property without due process of law as guaranteed by the due process clause of Section One of the Fourteenth Amendment to the Constitution of the United States for the reasons above stated. Appellant also contended that the law, as now construed and applied by the court, denied appellant the equal protection of the

laws, as guaranteed by the equal protection clause of Section One of the Fourteenth Amendment to the Constitution of the United States in that such law, as so construed, constituted class or special legislation against appellant and in favor of purchasers of its stock.

Appellant also urged upon the petition for rehearing that the Court's finding that the legislature intended to revive barred claims generally was made without record evidence in support thereof; that the appellant had no opportunity to submit evidence on legislative intent at the original trial (the law not being in existence then); that it was denied the right to do so on its motion for a new trial; that it was entitled to know the facts, if any, of which the lower Court (if it did) and the Supreme Court seemingly took judicial notice; that it was entitled to an opportunity to submit evidence to refute the erroneous assumptions made; and that if the Supreme Court of Minnesota refused to afford appellant such opportunity (by remanding or referring the case for evidence on that issue), appellant would be denied a fair trial and due process of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States (Appendix J, p. 59.

The petition was denied without opinion on the 23rd day of February, 1944, (see Appendix K, p. 61, and the judgment, upon which this appeal is based, was entered on the same day (see Appendix L, p. 62.

The federal questions were properly and promptly raised and preserved in the state courts.

Such judgment is a final judgment of the State Supreme Court, and it does not rest on a state ground which independently and adequately supports it. If the state statute in question, as here construed and applied, is found by this Court to be violative of the due process or equal protection

clauses of the Constitution of the United States, the judgment must be reversed.

V.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on an appeal to review the final judgment here in question, within the provisions of said Section 237 (a) of the Judicial Code, as amended (28 U. S. C. A., Section 344 (a)):

Dahnke-Walker Milling Co. v. *Bondurant*, (1921) 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106, involving a question of constitutionality of a state statute as there construed and applied, wherein it was said:

> "'Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error".

There were cited, "for like rulings on like grounds", *Eureka Pipe Line Co.* v. *Hallanan*, (1921) 257 U. S. 265, 66 L. Ed. 227, 42 S. Ct. 101; and *United Fuel Gas Co.* v. *Hallanan*, (1921) 257, U. S. 277, 66 L. Ed. 234, 42 S. Ct. 105.

Standard Oil Company of California v. *Johnson*, (1941) 316 U. S. 481; 86 L. Ed. 1611, 62 S. Ct. 1168, wherein it was said:

> "Since validity of the State statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here in appeal under Sec. 237 (a) of the Judicial Code, 28 U. S. C. A. Sec. 344 (a)".

Fiske v. *State of Kansas*, (1927) 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655.

New York Ex Rel. Bryant v. *Zimmerman*, (1928) 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61.

Doty v. *Love*, (1935) 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558.

The question of unconstitutionality of the 1941 law, on the ground of denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, and the question of denial of a fair trial in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, were first presented in appellant's petition for reargument in the State Supreme Court, after that Court's finding that the Minnesota legislature intended, by the 1941 law, to revive actions specifically against the appellant and the National City Company. This was the first opportunity to raise these questions inasmuch as there had been no clear and unequivocal finding that the 1941 statute applied to the case and no specific finding of such legislative intent by the trial court. The Court denied the petition and, thereby, overruled the contention. The Supreme Court of the United States has jurisdiction on appeal to review the decision on these grounds, also, even though the precise issues were not raised in the trial court:

Missouri Ex. rel. Missouri Ins. Co. v. *Gehner*, (1930) 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326.

Cumberland Coal Co. v. *Board of Revision* (1931) 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48.

Home Ins. Co. v. *Dick*, (1930) 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338.

Concordia Fire Ins. Co. v. *Illinois*, (1934) 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830.

Because this Court has jurisdiction on the appeal, it has jurisdiction to consider, also, the additional assignment of

error pertaining to the denial of a fair trial under the due process clause, which by itself would have been the basis of a writ of certiorari only.

Prudential Insurance Co. v. *Cheek* (1921), 259 U. S. 530, at 547, 66 L. Ed. 1044, 42 S. Ct. 516.

Flournoy v. *Wiener* (case No. 252, United States Supreme Court), amendatory opinion rendered March 27, 1944, not yet published in official reports.

VI.

Statement of Grounds Upon Which It Is Contended That Questions Involved Are Substantial.

SUMMARY.

As a matter of general public policy, the state court decided at least four broad federal questions of legislative and judicial power which are of national importance and significance under the Fourteenth Amendment to the Constitution of the United States:

(a) It decided that a state legislature has the power, within the due process clause of the Fourteenth Amendment, to reverse a judgment of the highest court of the state, as to a party in whose favor the judgment was entered.

(b) It decided that a state legislature has the power within the same clause, to revive a cause of action founded upon breach of a statute, long after that cause of action has been barred.

(c) It decided that a state legislature has the power, within the equal protection clause of the Fourteenth Amendment, to enact a law specifically intended (so the state court found) to reverse a rule of law established by the highest state court for a specific case, so as to allow an arbitrary class of litigants, to maintain pre-

viously barred actions against a particular person or corporation.

(d) It decided that a state court has the power under the due process clause, to decide a question of legislative intent seemingly by judicially noting "facts", but without giving a litigant the opportunity to ascertain and hear such evidence and to dispute such evidence by the other proof or argument.

In net legal effect, the state court has decided that a party aggrieved by a final adjudication against him in the highest state court may, at any time in the future and long after the claim has been barred by all existing law, go to a state legislature and procure the enactment of a statute specifically intended by the legislature not only to revive all barred claims of that kind but to abrogate the very judgment against said party so that he might thereafter reassert his cause of action, and that such legislation would not violate the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

Such a decision raises substantial federal questions which, so far as we can ascertain, have not been decided by this Court. We submit, however, that such decision is contrary, upon legal principle, to the applicable decisions of this Court.

Points and Authorities.

1. *The state court decision, in holding that the 1941 law, as here construed and applied, does not deprive appellant of his property without due process of law even though it reverses a prior judgment of that court in the same case, presents a federal question of substance.*

The decision is plainly not in accordance with the applicable decisions of this Court.

It has long been the established rule of this Court that a litigant has a vested right in a judgment in his favor which cannot be altered or destroyed constitutionally by an act of a state legislature. *Memphis* v. *United States* (1877), 97 U. S. 293, 24 L. Ed. 920. A vested right in an existing defense is given the same protection. *Pritchard* v. *Norton* (1882), 106 U. S. 124, 27 L. Ed. 104, 1 S. Ct. 102. Whatever might be the power of a legislature to act upon pending actions or as to proceedings subsequently to be commenced, "when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases". *McCullough* v. *Virginia* (1898), 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134.

The rule has been re-asserted and followed in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 S. Ct. 325. It has been acknowledged to be well settled, as applied to private rights under a judicial decision, in *Hodges* v. *Snyder* (1923), 261 U. S. 600, 67 L. Ed. 819, 43 S. Ct. 435. It has recently been noted in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600 (See Footnote 25 of opinion).

Even *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, which the state supreme court cited as its principal authority for its conclusion, is unanimous in its view that a legislature does not have the constitutional power to abrogate a "vested right".

Here, appellant had a vested right in the decision and judgment of the state court entered on the first appeal in the case, wherein it was held that any cause of action which appellee may have had against appellant for breach of the Minnesota securities law, was barred. The subsequent 1941 law, as here construed, destroyed that right, in violation of the due process clause.

2. The state court decision, in holding that the 1941 law, as here construed and applied, does not deprive appellant of its property without due process of law even though it revives a statutory cause of action which had become barred by the then applicable statute of limitations, presents a federal question of substance.

The question of legislative power to revive a statutory cause of action, barred under a statute of limitations expressly covering "a liability created by statute", has never been squarely determined by this Court. The decision, however, is contrary to the clearly stated principles of this Court's applicable decisions.

The state supreme court mistakenly relied upon *Campbell v. Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, in which, by a divided court, it was held that a barred remedy for "violation of an implied contract to pay money" could be constitutionally revived. The rule of the *Campbell* case, however, is not applicable to a case where, as here, the action was a purely statutory one for breach of the securities law.[3] Rather, the right of action created by the Blue Sky statute has been limited by the six-year statute of limitations, expressly covering "a liability created by statute", even though such limitations provision was enacted after

[3] The state supreme court, on the prior appeal, said the action was one founded "upon a liability created by statute". *Pomeroy v. National City Co.* (1941), 209 Minn. 155, 296 N. W. 513. In the opinion which is the basis of this appeal, the state supreme court in its opening paragraph described the action as one in tort based on a violation of the registration provisions of the Blue Sky statute. Numerous previous decisions of the state court had held the action to recover the purchase price of securities for non-registration of stock to be a statutory cause of action, the sale being illegal because not made in compliance with the registration provisions of the Blue Sky Law. *Vercellini v. U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672; *Webster v. U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806; *Edson v. O'Connell* (1934), 190 Minn. 444, 252 N. W. 247; *Mertz v. Hudson-Mfg. Co.* (1935), 194 Minn. 636, 261 N. W. 472.

different time and was located in another place in the statute books. See *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12; *Burzinski* v. *Kinyon Inv. Co.* (1934), 192 Minn. 335, 256 N. W. 233; *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513. Upon expiration of that period, the cause of action became extinguished. It could not be revived constitutionally by subsequent legislation.

The decision here is contrary, on legal principle, to *Davis* v. *Mills* (1904), 194 U. S. 451, 48 L. Ed. 1067, 24 S. Ct. 692, and to *Danzer & Co.* v. *Gulf & Ship Island Ry. Co.* (1924), 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612. In the *Davis* case, this court (through Mr. Justice Holmes) considered the *Campbell* case, among others, and then indicated doubt that any proper practical distinction could be drawn between statutes of limitations which extinguish the right itself and those which bar the remedy to enforce such right (194 U. S. 451, at 456-57. It held that the statutory cause of action against directors of a corporation was conditioned by a limitations provision which expressly covered actions "to enforce a liability created by law" (almost identical with the limitations provision in the case at bar), although such provision was enacted "at a different time" and was located in a different title than the statute creating the liability. The *Danzer* case, after citing with approval the *Davis* case, held expressly that a barred cause of action created by statute, which was conditioned by a limitations provision contained in the same statute "or another provision", could not be revived by subsequent legislative act without violating the due process clause. This Court said it was not necessary there to "re-examine the doctrine of *Campbell* v. *Holt* • • • as it is plain that case does not apply. That was an action on a contract for the recovery of money."

We have been unable to find, after diligent search a decision of this Court which has held or even suggested the interpretation put upon the *Campbell* case by the state

court here. In a comparatively recent decision, *Home Insurance Co.* v. *Dick* (1930), 281 U. S. 397, at 409, 74 L. Ed. 926, 50 S. Ct. 338, this Court cited the *Campbell*, *Davis* and *Danzer* cases and then said in footnote 7 of the opinion:

> "Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine".

The same general question was also raised, but not decided, in *Mid-State Horticultural Co.* v. *Pennsylvania Rd. Co.* (1943), — U. S. —, 88 L. Ed. 83, — S. Ct. —, wherein the *Davis* and *Danzer* cases were again cited.

If, however, it is to be assumed or here found that such interpretation of the *Campbell* case is the correct one, we submit that that decision should be re-examined by this Court, in the light of the dissenting opinion in that case and the refusal of a vast majority of the state courts to follow it, and that it should be over-ruled.

It is significant that the most of the highest state courts, where the question has been raised since *Campbell* v. *Holt*, have expressly followed the principle and reasoning of the dissenting opinion—that the right to set up the bar of a statute of limitations as a defense to *any* cause of action, after the statutory period has run, is a vested right which cannot be taken away constitutionally by subsequent legislative act. At least eleven state supreme courts have so held;[4] in only three states[5] has the majority view of the

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[4] *Wasson* v. *State* (1933), 187 Ark. 537, 60 S. W. (2) 1020; *Bussey* v. *Bishop*, (1929) 169 Ga. 251, 150 S.E. 78; *Board of Education* v. *Blodgett* (1895) 155 Ill. 441, 40 N.E. 1025; *Siefkin* v. *Siefkin*, (1939) 150 Kan. 396, 92 Pac. (2) 1005; *Jackson* v. *Evans*, (1940), 284 Ky. 748, 145 S.W. (2) 1061; *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142; *Wilkes County* v. *Forester*, (1933) 204 N. C. 163, 167 S.E. 691; *Rayner* v. *Comley Lumber Co.* (1934) 169 Okla. 576, 38 Pac. (2) 5; *Cathey* v. *Weaver*, (1922) 111 Tex. 515, 242 S.W. 447; *Re Swan*, (193-

Campbell decision been applied to cases not involving special circumstances, such as to relieve a party from a technical procedural mistake or to cover claims by or against a public corporation.[6] Furthermore, none of those three cases involved a statutory cause of action. See annotations in *36 A. L. R. 1317*, and *133 A. L. R. 384*; and *34 Am. Jur. sec. 35, p. 32*; Most of the writers, also, who have considered *Campbell* v. *Holt*, have questioned the theoretical distinction made by the holding of that case and have favored its dissenting opinion. *Lewis' Sutherland, Statutory Construction* (2nd ed.) Vol. 2, sec. 708, p. 1288; *Wood, Limitations* (4th ed.), Vol. 1; sec. 11, pp. 47-49; *24 Columbia Law Review*, 803 (1924); *10 Cornell, L. Q. 212* (1924); *2 Geo. Wash. L. Rev.* 100 (1933). See also, *Rottschaefer, Constitutional Law* (1939), sec. 252 p. 548-9.

So far as we can ascertain, this Court since 1885 has not considered the holding of the *Campbell* case with reference to its soundness as a matter of public policy. Its lack of acceptance by such a preponderance of able state courts and legal commentators raises a legitimate question. Thus far, this Court has followed or approved only its *dicta*—determining that in cases involving title to real estate or personal property, there could be no constitutional revival of a barred cause of action, *Sharon* v. *Tucker* (1892), 144 U. S. 533, 36 L. Ed. 532, 12 S. Ct. 720; *Toltec Ranch Co.* v. *Cook* (1903), 191 U. S. 532, 48 L. Ed. 291, 24 S. Ct. 166; *Davis* v.

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95 Utah 408, 79 Pac. (2) 999; *Eingartner* v. *Illinois Steel Co.*, (1899) 103 Wis. 373, 79 N.W. 433. See, also, *Dunbar* v. *Boston & P. R. Co.*, (1902) 181 Mass. 383, 63 N.E. 916; and *Hopkins* v. *Lincoln Trust Co.*, (1922) 135 N. Y. 213, 135 N.E. 267.

[5] *Orman* v. *Van Arsdell*, (1904) 12 N. Mex. 344, 78 Pac. 48; *Gilbert* v. *Selleck*, (1919) 93 Conn. 412, 106 Atl. 439; and *Herr* v. *Schwager*, (1927) 145 Wash. 101, 258 Pac. 1039.

[6] Such as *Robinson* v. *Robins Dry Dock & Repair Co.* (1924) 238 N. Y. 271, 144 N.E. 579, and *Jackson Hill Coal & Coke Co.* v. *Board of Commissioners*, (1914) 181 Ind. 335, 104 N. E. 497.

Mills, supra; Northern Pac. Ry. Co. v. *Ely* (1905), 197 U. S. 1, 49 L. Ed. 629, 25 S. Ct. 302; *Stewart* v. *Keyes* (1935), 295 U. S. 403, 79 L. Ed. 1507, 55 S. Ct. 807. In none of these cases was it indicated that the rule would be otherwise as to a barred statutory cause of action not involving title. Rather, in *Davis* v. *Mills, supra*, this Court questioned the soundness of the basic distinction, such as was made in the *Campbell* case, between limitation provisions which affect rights and those which affect remedy only, Mr. Justice Holmes saying (194 U. S. 451, at 456) that, "It is quite incredible that such an unsubstantial distinction should find a place in constitutional law".

The federal courts have followed the *Campbell* case only as to special statutes enacted in favor of the United States to revive outlawed tax claims. See, for example, *Pittsburgh Can Co.* v. *United States*, (1940—C. C. A. 3rd Cir.) 113 Fed. (2d) 821; which, like the others, is based primarily on *Graham* v. *Goodsell*, (1930) 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186. In the latter case (282 U. S. at 429), it was said that a distinction is made between the validity of a "curative statute aptly designed to remedy mistakes and defects in the administration of the government" and "a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention". See note in *133 A. L. R. 384, at 388*.

The 1941 law, as here construed and applied, deprives appellant of its property without due process of law of the Fourteenth Amendment to the Constitution of the United States. The holding of *Campbell* v. *Holt*, if applicable at all, should be over-ruled.

3. *The state court decision, in holding that the 1941 law, as here construed and applied, does not deny appellant the equal protection of the laws within the Fourteenth Amendment, presents a federal question of substance.*

The state court expressly found as follows: (See Appendix I)

> "The legislature acted promptly after our first opinion was filed. The inference is plain that it was dissatisfied with the law as laid down in that opinion and regarded it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute, as had been held in the federal court. City Co. of New York v. Stern (8 Cir.) 110 F. (2d) 601.
>
> "That it had all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered. It was well known that a multitude of sales of this and other unregistered stock had been made in this state shortly before the 1929 crash. The evidence in this case shows about 500 sales of Chase units in Minnesota by this defendant in 1929. The legislature must have known that the great bulk of the violations of the statute had occurred prior to the crash and that few, if any, had occurred afterwards. As heretofore stated, defendant effected its withdrawal from the state in 1931. In the National City case (Pomeroy v. National City Co. 209 Minn. 155 N. W. 313), the withdrawal was effected in 1934. If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any, cases."

This Court is bound by this construction and application of the statute, "and the case must be considered as though the statute had, in specific terms," so provided,

and "as though such meaning had been specifically expressed therein." *Cudahy Packing Co.* v. *Parramore* (1923) 263 U. S. 418; 68 L. Ed. 366, 44 S. Ct. 153; *Nights of Pythias* v. *Meyer*, (1924) 265 U. S. 30, 68 L. Ed. 885, 44 S. Ct. 432; *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.*, (1934) 291 U. S. 352, 78 L. Ed. 840, 54 S. Ct. 392.

The sole question here is, not whether the statute may have been given another construction and application, but whether the statute, as here construed and applied, is valid: *Concordia Fire Ins. Co.* v. *Illinois*, (1924) 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830; *Prince* v. *Commonwealth*, (1944) — U. S. —, 88 L. Ed. 403, — S. Ct. —.

As the proviso of the law has been so construed and applied, the legislature in effect enacted a special statute which was designed and intended to reopen for a period of one year after July 1, 1941, all claims against appellant and National City Company, *only*, and as to "this stock" *only*, and to leave the bar of the limitations statute unchanged as to all other corporations, whatsoever their kind or nature.

It is a settled rule of this court that the equal protection clause of the Fourteenth Amendment requires that the classification of persons or corporations for legislative purposes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Southern Railway Co.* v. *Greene* (1910) 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287; *Royster Guano Co.* v. *Virginia* (1920) 253 U. S. 412, 64 L. Ed. 989, 40 S. Ct. 560; *Louisville Gas and Electric Co.* v. *Coleman*, (1928) 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423.

The construction and application of the 1941 law given by the state court violates these fundamental standards. It is arbitrary; it rests upon no fair or reasonable basis whereby appellant and National City Company might be

distinguished from hundreds of other securities houses throughout the country who had sold securities in Minnesota during the decades "more than five years" before July 1, 1941, the effective date of the law. Nor could there be any logical basis for legislation enacted for the specific purpose of restoring to purchasers of two stocks in this state rights of action which were not restored to purchasers of thousands of other stocks in this state during those same decades "more than five years" prior to July 1, 1941.

Nor can the law be sustained as a proper classification of corporations foreign to the state of Minnesota, since that distinction has no reasonable basis with relation to the object of the legislation and there is no reasonable presumption that equality would result. *Air-Way Electric Appliance Corp.* v. *Day*, (1924) 266 U. S. 71, 69 L. Ed. 169, 45 S. Ct. 12; *Power Mfg. Co.* v. *Saunders*, (1926) 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678. The discrimination is entirely arbitrary, no matter what basis is assumed. *Smith* v. *Cahoon*, (1931) 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582; *Borden's Farm Products Co.* v. *Baldwin*, (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187.

The 1941 law, as here construed and applied, denies appellant the equal protection of the laws.

4. The state court decision, in finding the legislative intent (above discussed) without allowing appellant the opportunity to a trial on this vital issue or to know the factual basis for such finding, and in holding that such procedure did not deny appellant the due process of law guaranteed by the Fourteenth Amendment, presents a federal question of substance.[7]

In construing the 1941 law, the Minnesota Court found that it was the purpose and intent of the legislature to

[7] This error is properly includable on an appeal. See last paragraph of Section V of this Jurisdictional Statement, at p. 12, above.

revive actions which the court previously held barred in this and the *Pomeroy* cases by decisions rendered in January, 1941. The relevant portion of its opinion (quoted in the first paragraph of Point 3, p. 20, above) clearly shows that the state court went beyond the words of the statute itself and relied on purported factual circumstances.

The question of legislative intent in this case thereby ceased to be a pure question of law based alone on the words of the statute as it is in some cases, rather it became, also, a question of fact concerning which courts take evidence as upon any other question of fact. See, Henry Wolf Bikle, "Questions of Fact Affecting Constitutionality," 38 Harv. L. Rev. 6; 1 *Wigmore on Evidence* (3d. ed.) Sec. 4 (1) pp. 145-46; 9 *Wigmore on Evidence* (3rd ed.) Sec. 2555, pp. 521-22; *Nashville, Chattanooga & St. Louis Ry. v. Walters*, (1934) 294 U. S. 405, 79 L. Ed. 949, 55 S. Ct. 486.

There is no proof in the record here of the intent of the legislature to revive barred claims against appellant and National City Company, except the very incidental fact that appellant had sold about 500 Chase units in Minnesota prior to 1929. Furthermore, at no time in this case was appellant afforded an opportunity to submit any proof whatsoever, relating to the question of legislative intent, because: (a) the one and only trial of the case occurred in May 1939, almost two years prior to the enactment of the 1941 law; (b) the trial court in June, 1942, without taking any new evidence found that the 1941 law applied to the case but made no express finding on the question of legislative intent (see Section IV, subsection 3, of this Jurisdictional Statement, at p. 6, above); (c) appellant's motion in September, 1942, for an amended findings or a new trial on the ground, among others, that the finding as to the application of the 1941 law was not supported by the evidence, was denied in November, 1942.

which ruling was duly assigned as error on the appeal to the state supreme court.

Not until the Supreme Court opinion did there appear in this case any specific findings of legislative intent. At its first opportunity, appellant on petition for rehearing challenged such findings, claiming the unconstitutional denial of a fair trial on that issue. It therein made an offer of proof, and requested a remand of the case to the trial court for trial on the issue of legislative intent, or a reference to a referee for taking evidence on the issue.[8] The State Supreme Court denied all of these requests, in denying the entire petition.

The findings of fact on this issue were drawn, almost entirely, from sources outside the law itself and presumably were predicated upon the theory of judicial notice. While it is true that courts, in determining legislative intent, may take judicial notice of the circumstances surrounding the passage of a statute, it is clear that the sources of findings on such intent (be they the deliberations of legislative committees, statements of legislative sponsors, and debates) should be specifically cited. See *Helvering* v. *Griffiths*, (1943) 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636; *United States* v. *Wrightwood Dairy Co.*, (1942) 315 U. S. 110, 86 L. Ed. 726, 62 S. Ct. 523; *United States* v. *Dickerson*, (1940) 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034, and see, also, *Barlau* v. *Minneapolis Moline Power Co.*, (1943)

[8] In its Petition for Rehearing, a part of this appeal record, appellant made an offer of proof (Point II of Petition) based on the affidavit of the official sponsor of the 1941 statute, i. e. the Commissioner of Securities of the Department of Commerce, and two members of the judiciary committee of the House of Representatives where the bill was considered and discussed. Appellant also offered the official Journals of the Minnesota House of Representatives and Senate, together with the committee reports. All of these affidavits and legislative records show that the legislature at no time discussed or considered that the 1941 statute was intended by anyone to revive the actions against the appellant and the National City Company which Minnesota Supreme Court held barred in January, 1941.

214 Minn. 564, 9 N. W. (2d) 6. Furthermore, the resort to judicial notice does not justify a court in denying an opponent the right to a trial wherein he may show contradictory facts and circumstances—to the end that the court's conclusion on the issue will be based on all available evidence and not alone on conjecture and surmise.

The determination of the matter of legislative intent by the state supreme court in this case, is contrary to the settled decisions of this court which guarantee a fair trial to any litigant, even as to issues properly the subject of judicial notice.

Thus, this Court, in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724, held that proper application of the principle of judicial notice cannot deprive the opponent of two fundamental rights: (a) the right to know the particular or evidential facts of which the court took judicial notice, and (b) the right to dispute by evidence the matter judicially noticed if he believes it is disputable. If either of these rights is not given, there is a denial of a "fair hearing essential to due process". This rule had been recognized previously in 5 *Wigmore on Evidence* (2d Ed.) Sec. 2567, p. 570. It has been re-affirmed in 9 *Wigmore on Evidence* (3rd Ed.) sec. 2567, p. 535.

Other expressions of this Court are to the same effect. In *Borden's Farm Products Co.* v. *Baldwin*, (1934) 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187, this Court observed that the "sphere of judicial notice" has definite limitations and that the constitutionality of legislative action should not be determined without the taking and considering of all available evidence on the question. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, (1930) 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, and *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, *supra*, it was held that

the due process clause requires a state court (a) to afford a party the opportunity to present its case and to be heard in its support, and (b) to consider all of such evidence, before deciding the validity of a state law.

Here, such rights and due process were denied appellant. The "facts" noticed (excepting the mere fact of 500 sales of such stock in Minnesota prior to 1929) were and still are unknown to appellant. They are squarly contrary to all facts bearing on the question of legislative intent which appellant has been able to discover. At no time has appellant had the opportunity to examine the sources, if any, seemingly relied upon by the state court. At no time has appellant had the opportunity to submit the readily available and competent proof which is strongly to the contrary of the assumptions made by that court.

The state court's summary disposition of the issue without trial is wholly without legal precedent and is devoid of the most elementary principles of justice. A substantial right guaranteed by the due process clause has been violated.

VII.

Statement Respecting Opinions of State Supreme Court.

The opinion of the Supreme Court of the State of Minnesota, upon which was entered the judgment from which this appeal is taken, is reproduced as Appendix I, p. 50. It is reported in 13 N. W. (2) 1, but is not yet published in the official Minnesota reports. The petition for rehearing was denied by an order, dated February 23, 1944, without opinion. The order is reproduced as Appendix J, p. 59.

The opinions of the Supreme Court of the State of Minnesota, which were rendered on January 10, 1941, in the same case and in the related case of *Pomeroy* v. *Na-*

tional City Company and wherein it was held that appellee's cause of action for violation of the state securities law was barred, are reproduced as Appendixes B and C and are attached to this jurisdictional statement. They are reported as follows: *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518; and *Pomeroy* v. *National City Co.*, 209 Minn. 155, 296 N. W. 513.

Wherefore, appellant respectfully submits this statement and prays the order of this Court allowing this appeal for review of the judgment of the Supreme Court of the State of Minnesota, entered in the above entitled cause on February 23, 1944.

Dated: April 21, 1944.

Respectfully submitted,

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant.

By F. H. STINCHFIELD,
S. S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

APPENDIX A.

The limitations statute which the Minnesota Supreme Court had previously held applicable to actions for alleged violation of the registration provisions of the Blue Sky Law is Subdivision 2 of *Mason's Minnesota Statutes*, 1927, Section 9191 (now known as Minnesota Statutes, 1941, section 541.05):

> "9191. *Various cases, six years*—The following actions shall be commenced within six years:
>
> "1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.
>
> "2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture. . . ."

APPENDIX B.

January 10, 1941

No. 32,669

DONALD L. POMEROY,

v.

NATIONAL CITY COMPANY (also known as City Company of New York, Inc.).[9]

Limitation of action—statutes of limitation—application to foreign corporations:

1. General statutes of limitation, although making no mention of foreign corporations, apply thereto notwithstanding.

Statute—construction—purpose of statute.

2. If a case is fairly within the purpose of a statute, it must go to decision thereunder, unless excluded by necessary implication or explicit terms.

[9] Reported in 296 N. W. 513.

Statute—construction—avoidance of capricious distinctions and unjust results.

3. Capricious distinctions are not to be imputed to the legislature. Unjust and indefensible results of a statute are to be avoided by construction, if possible.

Corporation—foreign corporation—"presence" in state for service of process—qualified departure—statute of limitations.

4. A foreign corporation which has ceased doing business in the state and withdrawn therefrom except that, in obedience to statute, it has left here a continuing agent for personal service of process in actions arising from its Minnesota business, is, in contemplation and as result of law, continuously present here for service upon it in such actions. Hence the running of the statute of limitations is not tolled by its qualified departure from the state.

Action in the district court for Hennepin county to rescind a sale of stock to plaintiff by defendant, a foreign corporation, on the ground of violation of the blue sky law, and to recover the purchase price thereof. From an order, Luther W. Youngdahl, Judge, sustaining a demurrer to defendant's defense of the statute of limitations, the latter appealed. Reversed.

Doherty, Rumble, Butler, Sullivan & Mitchell, for appellant.

James D. Bain and *Norman D. Arvesen*, for respondent.

O'Brien, Horn & Stringer and *Leonard, Street & Deinard, amici curiae*, filed separate briefs in support of the contention of respondent.

STONE, *Justice*.

Defendant appeals from an order sustaining a demurrer to its pleas of the statute of limitations.

From April, 1917, to August, 1934, defendant was in this state as a foreign corporation, qualified under applicable statutes. In August, 1934, defendant ceased to transact

business in Minnesota and formally withdrew therefrom, except that, in compliance with the statutes (Mason Minn. St. 1927, §§ 3996-11 and 7494) it had irrevocably appointed both commissioner of securities and secretary of state its agents for service of process in actions arising from its Minnesota business.

It is enough of the facts that plaintiff must be considered to have sued "upon a liability created by statute", arising from defendant's business in Minnesota. Under 2 Mason Minn. St. 1927, § 9191, the action is barred, not having been commenced within six years from the time the cause of action accrued, in April, 1929 (when defendant was doing business here), unless saved by the tolling provisions of 2 Mason Minn. St. 1927, § 9200, which declare that:

"If, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the times herein limited after his return to the state; and if, after a cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action".

In respect to the appointment of the commissioner of securities, the statute declares that service upon him "shall be as valid and binding as if due and personal service had been made." Defendant's appointment of the secretary of state was made under 2 Mason Minn. St. 1927, § 7494 (since superseded by 3 Mason Minn. St. 1940 Supp. §§ 7495-13, 7495-16). "Such appointment," it is declared, "shall continue in force as long as any cause of action, right, or claim against said corporation survives in this state, and service upon such agent shall be deemed personal service upon the foreign corporation so appointing him."

If, within the meaning of the tolling statute, defendant departed therefrom in 1934 and has since resided out of the state, the statute of limitations was tolled and the demurrer properly sustained. This presents the one question for decision.

1. Such limitation statutes, although making no mention of foreign corporations, apply thereto notwithstanding,

City of St. Paul v. *C. M. & St. P. Ry. Co.* 45 Minn. 387, 48 N. W. 17; annotation, 59 A. L. R. 1336. Statutes abound with use of the word "person" to include corporations. See Index, 2 Mason Minn. St. 1927, "Person". The legislature has enjoined that "unless another intention clearly appears . . . the word 'person' (in statutes) may extend and be applied to bodies politic and corporate." 2 Mason Minn. St. 1927, § 10033.

2. It is idle to suggest that in the enactment long ago of our general statute of limitations the legislature anticipated actions against foreign corporations withdrawn from the state, leaving behind a continuing agency for service of process. So we have a problem thus dealt with in Gray, The Nature and Sources of the Law (2 ed.) p. 173:

"The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

We cannot agree that, in the process of decision, judges "guess" concerning such a problem or any other. Nothing is more essential in that process than for the judge to watch constantly the line between reasonable inference or logical deduction on the one hand and guess or conjecture on the other. The former constitutes the only sound material for decision.

We would be guilty of judicial legislation if we did not apply § 9200 to all cases not excluded by its terms and fairly within both its reason and purpose.

Statutes normally have their policy, their purpose, their reason for being. Legislators, no more than judges, have the faculty of comprehensive and unerring prevision. But, unlike judges, their function is to make rules for future conduct. The application of such rules to all cases not excluded by their terms and within their purpose and reason for being is a primary duty of judges.

That duty is not to be shirked simply because it is clear that the legislators did not foresee all cases to which their rule might apply. If a case is fairly within the purpose of a statute, it must go to decision thereunder, unless excluded by necessary implication or explicit terms, as by stated exception.

3. As to § 9200, this is a case unforseen by its framers. But its purpose is not thereby to be defeated as to any case fairly within it. The object is repose, to be achieved by arbitrary limitation of time barring resurrection of stale claims. To the extent that judicial construction sets up a category of cases against which that bar cannot run, notwithstanding the complete amenability of the debtor to personal service, there is created an exception from the rule of the statute which by so much annuls its policy and defeats its purpose.

Such capricious disfinctions are not to be imputed to the legislature. Unjust and indefensible results of a statute are to be avoided by construction, if possible. 6 Dunnell, Minn. Dig. (2 ed. & Supps.) § 8943.

4. Generally, a corporation is present wherever it is doing business. While its domicile (particularly in respect to federal jurisdiction) is and always remains in its "home state," it may also be continuously present in others because of the presence and activities of its agents therein. For all purposes except the exercise of local jurisdiction, a corporation may be absent from the state of its incorporation in the sense that it has no business there, no office and no agent except one for service of process.

Such presence or any presence of a corporation is not fictional. It is the result of law. It exists only in contemplation of law. It is nevertheless real and a fact to be so regarded for all purposes of law. In re Trust Under Will of Clarke, 204 Minn. 574, 284 N. W. 876.

The domestic corporation doing no business in Minnesota, having no office here save one for service of process, is continuously present for purpose of being served. That being so, and for no other reason, the statute of limitations continues to run in its favor. Why not also as to a foreign cor-

poration which has ceased business here, closing all its offices, dismissing all its agents, and withdrawing except for a statutory agent required by law for personal service?

That status is real and adequate residual presence for purposes of suit. The utmost of disagreement must admit that it is at least a complete and satisfactory substitute for the presence required by the tolling statute.

A corporation is not absent from a jurisdiction where *personal* service upon it is continuously inescapable. Reason cannot conclude otherwise, unless it fails to distinguish between the qualities which make up the personality of a natural person and those which characterize that of a corporation. There is a quality of ubiquity inherent in corporate personality impossible to that of a natural person. It enables a corporation to be continuously present simultaneously in many jurisdictions.

A corporation is present anywhere only by agents. Such presence is a result attached by law to stated corporate action. It is nevertheless fact. Being the creature of law, the law may limit and qualify it. So it may be for the one purpose of serving process. For such purpose, the presence is real and sufficient. While it continues and for accomplishment of the law's purpose, the corporation cannot be considered absent.

The declaration of § 7494 that the service "shall be deemed personal" is equivalent to saying that for service of process the corporation remains personally present. Meaning and effect would not be more plain had the statute declared that the departing corporation, leaving here its authorized agent, was to be considered present for actions arising from its Minnesota business. Being present for that purpose, it is presently irrelevant that it is absent for all others.

The requirement of § 7494 of the appointment of the agent for service of process reaches every cause of action which "survives in this state." What must the cause of action survive in order to be within the statute?

The idea so expressed or implied must be given effect if possible. The survival of causes of action is a subject long covered by another statute, 2 Mason Minn. St. 1927, § 9656. Without more, and even though § 7494 were silent on the

question, a foreign corporation is liable in all actions against it which survive under § 9656. Hence, if the reference in § 7494 to claims which survive "in this state" has no other effect than that of § 9656, the clause is meaningless.

Inasmuch as the foreign corporation is liable in any event on a cause of action continuing under the survivorship statute (§ 9656) and not barred by limitation, the thought suggests itself that the reference in § 7494 to a cause of action which "survives" has another or additional meaning. That meaning seems to us simply that the corporation will be liable upon all causes of action arising out of its Minnesota business which, *at the time suit is commenced*, continue in spite of or survive *everything* which could deprive them of life or enforceability. A cause of action barred by the statute of limitations does not so survive. Only by holding that the clause "survives in this state" was intended to reach every claim upon which an action can be maintained, and so exclude those barred by limitation, can we give it any meaning. Even so, it does not have much, at most, it appears to have been used in abundant caution, to make sure that the agency would continue as long as any claim arising from the principal's Minnesota business continued enforceable.

We have considered all authorities cited, with additions. At the outset, we have the long settled policy of this court not to deny statutes of limitation their intended result of repose. Their purpose "in allowing specified times for commencing actions, and in making exceptions to the running of such times, is a practical one. It is to give to plaintiff what the legislature deemed a reasonable opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in any way a full and complete remedy, for the times specified, can have been intended" by the tolling statute. City of St. Paul v. C. M. & St. P. Ry. Co., 45 Minn. 387, 399, 48 N. W. 17, 21.

That thought was repeated and made the basis of decision in Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162 (followed in Pattridge v. Palmer, 201 Minn. 387, 389, 277 N. W. 18), where it was said, at page 360: "All statutes of limitation, in prescribing the periods, have reference for the beginning of such periods to the time when the opportunity to commence the action arises." That idea runs through much

of the decision law (e. g., Penley v. Waterhouse, 1 Iowa, 498) relating to the statute of limitations and the tolling thereof. It was applied to a foreign corporation in decisive fashion in Walker v. L. E. Meyers Const. Co., 175 Okl. 548, 549, 53 P. (2d) 547. The court said:

"For a foreign corporation, then, to be a non-resident of the state, or out of the state, in the sense of the statute, it must be out of the state in such sense as to render it impracticable at all times to obtain service of process upon it."

In accord is Title G. & S. Co. v. McAllister, 130 Ohio St. 537, 546, 200 N. E. 831, 835, where it was considered "a fair proposition" that "the test of the running of the statute should be the liability of the party invoking its bar to the service of process during the whole of the period prescribed." For this case, we repeat, under our statute the presence of the corporation for service of process is a fact. The law makes it so by saying that service upon the local agent shall be personal service. If that be not so, then at least there is a complete and satisfactory statutory substitute for the presence which respondent insist is necessary in order that the statute be not tolled. That was precisely the unanimous thought of this court expressed by Mr. Chief Justice Brown, in American Loan & Inv. Co. v. Borass, 156 Minn. 431, 434; 195 N. W. 271, 272. There, the plaintiff, a foreign corporation, had done all that it could to withdraw from Minnesota. However, under our statutes it was still amenable to suit here and was sued on a cause of action arising out of its Minnesota business. Consequently, and notwithstanding the otherwise efficacious steps taken to withdraw, "the corporation, as to all unadjusted transactions theretofore entered into with citizens of the state, remained in this state, in contemplation of law, subject to the jurisdiction of its courts by the service of process."

Our decision is opposed to that in City Co. of New York, Inc. v. Stern (8 Cir.) 110 F. (2d) 601. No one feels greater deference to, or has higher regard for, a decision of the Eighth Circuit Court of Appeals than the bench and bar of Minnesota. However, in a matter of state law, we would be shirking the responsibility which is ours if, where we differed with that eminent tribunal, we did not decide accordingly, with full statement of our reasons for doing so.

Aside from the decisions of this court soon to be considered, the decision in the *Stern* case was put upon the proposition, the gist of which is thus stated (110 F. (2d) 604):

"Nor can the defendant be said to reside and be present in Minnesota merely by reason of the fact that it remains subject to the jurisdiction of her courts in certain classes of actions. In this instance the right of the state to acquire jurisdiction in personam over the departed corporation in a limited class of actions does not rest on the basis of a fiction of continued presence in Minnesota but upon the defendant's express consent to accept service through designated attorneys."

We cannot agree that, under our statutes concerning departed foreign corporations, the local acquisition of jurisdiction *in personam* over them rests upon a mere "fiction" of continued presence, or that it arises, without more, from the consent of the defendant "to accept service through designated attorneys." The consent is present but only as a process. The result is a distinct status of presence in Minnesota. That the agent for service has no authority otherwise to represent his principal is unimportant. He has all the authority needed for personal service. Hence his corporate principal is present with him for personal service.

The decision in the *Stern* case, 110 F. (2d) 601, was put in part upon Venable v. Paulding, 19 Minn. 422 (488). The thought was that by that decision this court had adopted a literal application of the tolling statute. The entire discussion in the *Venable* case related to a defendant who was a natural person. He had been long absent from the state. A verdict had been directed in his favor. There was reversal solely because it was considered that there was a jury question whether, during all his absence, his residence continued in Minnesota so that there could have been the substituted personal service authorized by our statute (2 Mason Minn. St. 1927, § 9228), of which more later.

In the *Stern* case (110 F. (2d) 606), Rogers v. Benton, 39 Minn. 39, 42, 38 N. W. 765, 767, 12 A.S.R. 613, was considered "squarely in point on the construction of the tolling statute." There the defendant's absence "was permanent

in its nature," resulting from "a permanent change of residence." Concerning service upon him, the opinion states "the fact that Conant (assignee of the mortgage) might, notwithstanding the non-residence of the mortgagor (Benton), have resorted to substituted service of the summons, would not take the case out of the statutory exception (of departure from and residence out of the state). The right to foreclose by action, therefore, still existed when the Conants entered into posession."

At this point we should bring in a long-existing fact of our procedure. If the defendant is a natural person "residing or being within the state," service of summons may be made by delivering a copy "to the defendant personally." § 9228. But the service shall be deemed personal "if the copy . . . be left at the house of the usual abode of the person to be served, with some person of suitable age and discretion then residing therein."

Beginning possibly after 1888, when Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, was decided, leaving a copy of the summons with a person of suitable age and discretion at a defendant's usual abode, has been considered, as matter of terminology, "substituted service." In Rogers v. Benton, the phrase could not have had that meaning because there what we now characterize as "substituted service" was impossible. He had no residence, that is, no place of usual abode, in this state, because, as the opinion stated, the defendant had "resided in Connecticut" during the whole of the determinative period. So, when the court, in Rogers v. Benton, 39 Minn. 42, 38 N. W. 767, mentioned "substituted service of the summons" upon Benton, the reference was exclusively to publication of the summons. We no longer call that substituted service. It is constructive, not personal, service; and irrelevant when considering acquisition of jurisdiction *in personam*. It seems to us that Rogers v. Benton was inadvertently misconstrued in the *Stern* case, 110 F. (2d) 601.

In that case, there was a dissent by Judge Woodrough (101 F. (2d) 606). He considered that, because of continuing amenability of the defendant to personal service in this state, the statute had not been tolled. With that view we agree. Only by blinding ourselves to the stubborn

and decisive fact that defendant has been present actually and continuously for purposes of personal service of process; only by saying that, notwithstanding, it has been wholly absent from the state, could we do otherwise than hold as we do.

The cases deciding the similar issue which has arisen under statutes for service of process upon nonresident owners of automobiles have not been ignored. Of these cases, Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A. L. R. 480, and Maguire v. Yellow Taxicab Corp. 253 App. Div. 249, 1 N. Y. S. (2d) 749, affirmed, 278 N. Y. 576, 16 N. E. (2d) 110, are in disagreement with the thesis of this decision. In accord with it are Coombs v. Darling, 116 Conn. 643, 166 A. 70; Nelson v. Richardson, 295 Ill. App. 504, 15 N. E. (2d) 47; Arrowood v. McMinn County, 173 Tenn. 562, 121 S. W. (2d) 566, 119 A. L. R. 855.

The order under review is reversed.

Holt, *Justice* (dissenting):

I dissent. In my judgment the majority opinion in City Co. of New York, Inc. v. Stern (8 Cir.) 110 F. (2d) 601, gives more satisfactory reasons for holding that the statute of limitation is tolled when a foreign corporation, pursuant to 2 Mason Minn. St. 1927, § 7494, withdraws from this state, than does the erudite opinion of Mr. Justice Stone that such removal does not toll the statute. There is no need to add to what is said by the prevailing opinion in the *Stern* case.

Gallagher, *Chief Justice* (dissenting):

I agree with Mr. Justice Holt.

Peterson, *Justice* (dissenting):

I agree with Mr. Justice Holt.

APPENDIX C.

RUTH CHASE DONALDSON

v.

CHASE SECURITIES CORPORATION.

(Now Amerex Holding Corporation).[10]

January 10, 1941.

Nos. 32,572, 32,625.

Case followed.

Action in the district court for Hennepin county to rescind a sale of stock to plaintiff by defendant, a foreign corporation, on the ground of violation of the blue sky law, and to recover the purchase price thereof. After findings for plaintiff, Winfield W. Bardwell, Judge, defendant appealed from the judgment. Reversed, following Pomeroy v. National City Co., 209 Minn. 155, 296 N. W. 513.

Stinchfield, Mackall, Crounse & Moore and *John M. Palmer*, for appellant.

Streissguth & Gislason and *Leonard, Street & Deinard*, for respondent.

STONE, *Justice*:

Our decision in a companion case, Pomeroy v. National City Co., 209 Minn. 155, 296 N. W. 513, is decisive of the only question presented by this appeal and requires reversal of the judgment under review.

This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result.

Reversed.

GALLAGHER, *Chief Justice*; HOLT, *Justice*, and PETERSON, *Justice* (dissenting):

We dissent.

[10] 296 N. W. 518.

APPENDIX D.

MANDATE.

STATE OF MINNESOTA,
Supreme Court, ss:

THE STATE OF MINNESOTA,

To the Honorable Judge and Officers of the District Court Within and for the County of Hennepin Greeting:

Whereas, Lately in your Court, in action therein pending, entitled Ruth Chase Donaldson, Plaintiff, and Chase Securities Corporation, a corporation, now known as Amerex Holding Corporation, Defendant, a certain judgment was entered therein June 18, 1940 from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The said cause came on to be heard before our Supreme Court, and was argued in counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things reversed and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this remittitur.

Now, Therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Honorable Henry M. Gallagher, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this March 7, 1941.

[SEAL.]

GRACE KAERCHER DAVIS,
Clerk of Supreme Court.

By MAE SHERMAN,
Deputy.

STATE OF MINNESOTA, SUPREME COURT.

32572 and 32625.

RUTH CHASE DONALDSON, *Respondent*,

vs.

CHASE SECURITIES CORPORATION, a Corporation, Now Known as AMEREX HOLDING CORPORATION, *Appellant*.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the orders and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent herein the sum and amount of Three Hundred Eighty-nine and 70/100 Dollars ($389.70) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 7, 1941.

BY THE COURT.

Attest:

GRACE KAERCHER DAVIS,
Clerk.

STATEMENT FOR JUDGMENT.

Statutory Costs, $25.00; Printer, $284.15; Clerk, $5.00; Acknowledgments, $——; Return, $10.00; Postage and Express, $——; Appeal Bond, $65.55; Transcript, $——; Total, $389.70.

Satisfaction of Judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest:

——————,
Clerk.

By ——————,
Deputy.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Grace Kaercher Davis, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, Mar. 7, 1941.

GRACE KAERCHER DAVIS,
Clerk.

[SEAL.]

By MAE SHERMAN,
Deputy.

APPENDIX E.

Excerpts from appellee's supplemental motion, dated May 16, 1941, made in the trial court, after the passage of the 1941 law, asking that the findings of the trial court be amended to include an additional paragraph, as follows:

> "XXIX. Plaintiff's cause of action, based upon the illegal sale by defendant to her of said securities in violation of the provisions of the Blue Sky Law, was revived by virtue of the provisions of Laws of Minnesota, 1941, Chapter 547, Sec. 18 (Mason's Minnesota Statutes 1927, Secs. 3996-24 as amended), and the time for assertion of said cause of action was extended by the provisions of said statute to July 1, 1942, and said cause of action was asserted and commenced within the time limited by the statutes of the State of Minnesota for the commencement of such action."

This particular motion was made upon this ground:

> "That subsequent to the service of plaintiff's Notice of Motion dated April 9, 1941, the Legislature of the State of Minnesota enacted Laws of Minnesota 1941, Chapter 547, which revived plaintiff's cause of action based upon the illegal sale of securities to her, and that

plaintiff is thereby entitled to a finding of fact that plaintiff seasonably commenced her cause of action based on said illegality."

APPENDIX F.

Excerpts from cross-motion, dated May 14, 1941, made by appellant in the trial court, directed to appellee's supplemental motion, and asking that the original findings of fact and conclusions of law be amended, as follows:

"17. By striking therefrom the conclusions of law as found by the court and by substituting in lieu thereof the following:

"a. The only cause of action established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute' within the meaning of Section 9191 subdivision 2, Mason's Minn. Stat., 1927, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 547, Laws of Minn., 1941."

. . . . . .

"Said motion to amend the court's Findings of Fact, Conclusions of Law and Order for Judgment are based on the following grounds:

"1. The only cause of action established by the evidence is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the Statute of Limitations."

. . . . . .

"3. Section 18 of Chapter 547, Laws of Minnesota, 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat., 1927."

APPENDIX G.

Appellant, after the trial court's decision on June 24, 1942, made a motion, dated September 8, 1942, for amended findings of fact and conclusions of law, or for a new trial, as follows:

"a) To amend the court's findings and conclusions of law as to the 1941 law, by striking out the entire paragraph XXXII (See par. 22 of Motion to Amend); and also by striking out the conclusions of law and by substituting in lieu thereof the following (See par. 29 of Motion to Amend):

> "a. The only cause of action, if any, established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute,' within the meaning of Section 9191, subdivision 2, Mason's Minn. Stat. 1927, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 543, Laws of Minn. 1941.'"

upon these grounds:

> "1. That there is no competent evidence of any evidence in the case to support the findings of fact and conclusions of law or portions thereof specified above, which defendant hereby moves to strike from the findings of fact and conclusions of law entered herein on June 27, 1942."
>
> "2. That each and every part of said findings of fact and conclusions of law, specified above, which defendant hereby moves to strike from the findings of fact and conclusions of law entered herein on June 27, 1942, is contrary to law."
>
> "3. That there is competent evidence in the case to support the amended findings of fact and conclusions of law above proposed by defendant; and that said proposed findings of fact and conclusions of law are in conformity with the applicable law."

"4. That the only cause of action, if any, established by the evidence, is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the statute of limitations."

"5. That the matter contained in the court's present findings of fact, conclusions of law and order for judgment, heretofore specifically referred to, which are inconsistent with and irrelevant to an action based on violation of statute, should be stricken."

"6. That Section 18 of Chapter 547, Laws of Minnesota 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat. 1927."

. . . . . .

"12. That the Minnesota Blue Sky Law, if applied to said transaction between plaintiff and defendant, would deprive defendant of its property without due process of law, in violation of the provisions of Section 7 of Article 1 of the Constitution of the State of Minnesota, and Section 1 of the Fourteenth Amendment to the Constitution of the United States."

. . . . . .

"15. That plaintiff's cause of action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations."

(b) To grant a new trial as to the 1941 law (and other issues), upon these errors:

"2. That the findings of fact filed herein are not justified by the evidence."

"3. That the findings of fact filed herein are erroneous and contrary to law."

"4. That the conclusions of law filed herein are not sustained by the findings of fact."

"5. That the conclusions of law filed herein are contrary to law, and based on erroneous findings of fact." (R. 1184-85).

. . . . . .

"13. That the court erred in making finding of fact numbered XXXII (Third paragraph thereof), to the effect that 'insofar * * * as said provisions 'are applicable to plaintiff's cause of action,' the provisions of Laws of Minnesota, 1941, Chapter 547, Section 18, extended the time to July 1, 1942, within which plaintiff could have commenced this action and that this action was duly commenced 'within the time limited by the statutes of the state of Minnesota,' upon the following grounds:

(a) That it is not justified by competent evidence of any evidence.

(b) That it is erroneous and contrary to law.

(c) That if said finding constitutes a determination by the court that the plaintiff's cause of action, previously barred by the general statute of limitations (Section 9191 of Mason's Minnesota Statutes, 1927), was revived by said 1941 law, then said 1941 law is unconstitutional, null and void, in that said statute deprives defendant of its property without due process of law, in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States and Section Seven of Article One of the Constitution of the State of Minnesota.

(d) That said finding is vague and indefinite and does not specifically and directly say that said 1941 law is applicable to plaintiff's alleged cause of action; that if said 1941 law is not applicable to the case, this finding is wholly irrelevant, immaterial and contrary to law; that the defendant is entitled to a square finding of fact or conclusion of law as to whether the court's decision is predicated upon this statute." (R. 1195-96).

And upon these general grounds:

"1. That there is no competent evidence of any evidence in the case to support the findings of fact and conclusions of law or portions thereof, specified above, and that the court erred in making them."

"2. That each and every part of said findings of fact and conclusions of law, specified above, is contrary to law and that the court erred in making them."

"3. That the only cause of action, if any, established by the evidence is founded upon a violation of statute which, under the mandate of the Supreme Court of Minnesota in this case, was barred by the statute of limitations."

. . . . . .

"5. That Section 18 of Chapter 547, Laws of Minnesota, 1941, does not apply to this case and does not revive the action barred under Section 9191, Mason's Minn. Stat., 1927."

. . . . . .

"14. That plaintiff's cause of action, if any, accrued more than six years before the attempted commencement of this action and is barred by the statute of limitations."

APPENDIX H.

Appellant, on its second appeal to the Minnesota Supreme Court, assigned the following errors as to the 1941 statute (See Assignments of Error in Minnesota Supreme Court):

"4. That the trial court erred in denying defendant's alternative motions for amended findings of fact, conclusions of law and order for judgment or for a new trial".

. . . . . .

"31. That the trial court erred in making *Finding of Fact numbered XXXII*, as follows:"

* * * * * * *

"'In so far as the provisions of Laws of Minnesota, 1941, Chapter 547, Sec. 18 (Mason's Stat., 1927, Sec. 3996-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota' ".

"and in denying defendant's alternative motions to strike the whole of said finding and to substitute in lieu thereof the following:"

"'That the summons and complaint in this action were delivered to the Commissioner of Securities as defendant's agent for service of process on November 22, 1937; that said delivery and attempted service upon defendant was made more than six years after the sale of said Chase units' ".

"or for a new trial upon said error."

* * * * * * *

"42. The trial court erred in making conclusions of law numbered I * * * and in denying defendant's motion to strike the whole of said conclusions of law and to substitute the following in lieu thereof:

"'a. The only cause of action, if any, established by the evidence is one based on a violation of the Blue Sky Law in the sale of unregistered stock. Said cause of action is upon a 'liability created by statute' within the meaning of Section 9191, subdivision 2, Mason's Minn. Stat., 1927, and, having accrued more than six years prior to the commencement of the action, it is barred. Said cause of action is not revived by Section 18, Chapter 547, Laws of Minn., 1941."

APPENDIX I.

HENNEPIN COUNTY

No. 146

33458

(Ruth Chase Donaldson), Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, deceased, substituted as respondents, *Respondents*,

vs.

Chase Securities Corporation, now known as Amerex Holding Co., Appellant.

Endorsed: Filed December 31, 1943, Grace Kaercher Davis, Clerk Minnesota Supreme Court.

Syllabus

Henry M. Gallagher, *C. J.*:

1. Where shares of the stock of a New York corporation organized for the purpose of dealing in securities were so inseparably combined and consolidated with the shares of a New York national bank that the shares of neither could be sold or transferred without a like number of the other, the corporate stock was required to be registered under Mason St. 1927, § 3996-4, before it could be lawfully sold in this state although the bank stock was immune from registration.

2. Unless barred by the statute of limitations, a purchaser of unregistered stock which by the terms of § 3996-4 is required to be registered may recover the purchase price thereof.

3. Under the provisions of Minn. St. 1941, § 80.26 (Mason St. 1941 Supp. § 3996-24), a cause of action, arising out of

a violation of Mason St. 1927, § 3996-4, may be brought within one year from the effective date of § 80.26, although more than six years had elapsed since the delivery of the unregistered stock at the time of the enactment of § 80.26.

4. The fact that more than six years had elapsed prior to the enactment of § 80.26 and that under the general statute of limitations then in force a cause of action arising out of the violation of § 3996-4 was barred did not prevent the legislature by § 80.26 from lifting the bar of the statute of limitations, because the general statute of limitations applied merely to the remedy and did not vest such a right in the defendant that the legislature could not lift the bar. A general statute of limitations does not operate as payment of a debt or as satisfaction of liability for tort.

5. The proviso of § 80.26 applies to cases already pending as well as to those not instituted at the time that § 80.26 was enacted.

Judgment affirmed.

Opinion

HENRY M. GALLAGHER, *Chief Justice.*

This case comes here on appeal from a judgment for the plaintiffs as executors of the estate of Ruth Chase Donaldson, deceased. She originally brought the action but died after this appeal, and the executors were substituted in this court. She will hereinafter be referred to as the plaintiff. The action was brought in tort to recover as damages the purchase price of unregistered securities sold in Minnesota to plaintiff by defendant, a New York corporation, in August 1929, in alleged violation of the securities law of this state (Mason St. 1927, § 3996-4) which required their registration. It also sought recovery on the ground of deceit based on misrepresentation, but in view of our disposition of the case we need not consider that phase of the case.

On the trial below the court found in favor of plaintiff on the basis of a violation of the statute, holding as against

the defendant's plea of the statute of limitations that the statute had been tolled by defendant's withdrawal from the state on June 30, 1931. It therefore did not make findings on the deceit issue. On appeal, this court held that the general six-year statute had run against plaintiff because, notwithstanding the withdrawal of defendant from this state, service of summons could at all times have been made either on the secretary of state or the commissioner of securities as defendant's agents to receive service. The case then went back for findings on the deceit issue, which were in favor of plaintiff. *Pomeroy* v. *National City Co.*, 209 Minn. 155, 296 N. W. 513; *Donaldson* v. *Chase Securities Corp.*, 209 Minn. 165, 296 N. W. 513.

The securities sold to plaintiff were eight shares of the combined or consolidated stock of the Chase National Bank and of the defendant, which, by contract, could not be sold or disposed of separately. They are sometimes referred to as "Chase units." These shares had been combined in 1917 and were at one time listed on the New York Stock Exchange but in January 1928 were delisted so that stock of the defendant securities corporation was not exempted by the terms of our securities act from registration here. Shortly after the delisting, defendant opened an office in Minneapolis and commenced the sale of the combined stocks. The sale to plaintiff was made by a duly authorized agent of defendant. The defendant was licensed as a corporation to do business in this state and had irrevocably appointed the commissioner of securities as its agent to receive service. After the crash of 1929 it withdrew from the state, at the same time appointing the secretary of state its agent to receive service in any action arising out of transactions which took place in this state while it was licensed to do business here.

The opinions of this court were filed on January 10, 1941, while the legislature was in session. In April of that year, by L. 1941, c. 547, § 18, the legislature for the first time enacted a specific limitation upon actions based upon unlawful sales of securities, or deceit in connection therewith, and fixed six years from the date of delivery of the securities as the time within which action for violation of the

statute or deceit must be brought. This section of the statute reads as follows:

> "No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or nonregistration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date."

It is the proviso which presents what we regard as the controlling question in this case. (1) Did the legislature intend by this proviso to lift the bar of the statute where the general six-year limitation had already run? (2) If it intended to lift the bar, did it have the constitutional power to do so? (3) If these two questions be answered in the affirmative, was it the intent to include actions already pending?

1. It is quite obvious that at the time the securities were sold they were required by our law to be registered. The fact that a share of bank stock immune from registration was inseparably joined with stock which was nonimmune from registration for sale and transfer purposes would not immunize the corporate stock required to be registered. No authority or logic is necessary to sustain that holding. But see *Commr. of Banks* v. *Chase Securities Corp.*, 298 Mass. 285, 10 N. E. (2d) 472.

2. Since the stock was not registered the plaintiff is entitled to recover the purchase price unless barred by the

statute of limitations. *Vercellini* v. *U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672. The action is in tort. *Dreis* v. *Minnesota Petroleum Co.*, 189 Minn. 608, 611, 250 N. W. 563, 565.

3. The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read "more than five years *and less than six years* shall have elapsed," etc.

The legislature acted promptly after our first opinion was filed. The inference is plain that it was dissatisfied with the law as laid down in that opinion and regarded it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute, as had been held in the federal court. *City Co. of New York* v. *Stern* (8 Cir.) 110 F. (2d) 601.

That it had all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered. It was well known that a multitude of sales of this and other unregistered stock had been made in this state shortly before the 1929 crash. The evidence in this case shows about 500 sales of Chase units in Minnesota by this defendant in 1929. The legislature must have known that the great bulk of the violations of the statute had occurred prior to the crash and that few, if any, had occurred afterwards. As heretofore stated, defendant effected its withdrawal from the state in 1931. In the National City case (*Pomeroy* v. *National City Co.*, 209 Minn. 155, 296 N. W. 513), the withdrawal was effected in 1934. If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any, cases. Causes of action for such violations were not distinguished from those in deceit which under the prior law may or may not have accrued more than six years prior

to the effective date of the act. It is a rule of construction that provisos are limitations rather than extensions of legislative provisions (Minn. St. 1941, § 645.19), but all rules must yield to obvious legislative purpose; and where, as here, that purpose is expressed in clear language without qualification and the circumstances under which the law was enacted support the indicated purpose, we look to the intent expressed even if it is in a proviso when it should have been expressed without the use of the word "provided." Legislatures have habitually ignored the appropriate limitations of provisos (even those which they have themselves prescribed) and have used them to extend the scope of acts. When their purpose is clear, we are bound to give effect to it. *State ex rel. v. Browne*, 56 Minn. 269, 273, 57 N. W. 659. We regard the proviso here under consideration as lifting the bar of the general six year limitation.

4. It is the contention of defendant that the lifting of the bar of the statute in this case is a violation of the due process clauses of the state and federal constitutions. The leading case cited by plaintiff in support of the legislature's constitutional power to lift the bar is *Campbell v. Holt*, 115 U. S. 620, in which the Supreme Court drew the distinction between two kinds of statutes of limitations, those that prescribe a limit of time within which adverse possession of property may be challenged and those where time merely bars the plaintiff's remedy if the defendant chooses to rely on the bar. In the first class of cases something more occurs than the mere passage of time. The adverse holder has possession and claims title adversely to the record owner and thereby creates a vested right in himself which after the lapse of the time fixed by statute cannot be taken away from him against his will without violation of due process.

In the second class of cases the passage of time creates no vested right in the exemption from the remedy. As said in *Smart v. Baugh*, 3 J. J. Mar. (Ky.) 364, cited with approval in *Campbell v. Holt*, *supra*:

"* * * Time does not pay the debt, but time may vest the right of property. * * * The statute of

limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; * * *

In *Campbell* v. *Holt*, The Supreme Court held that a statute which applied merely to the remedy did not vest such a right in the defendant that the legislature or, in that case, the constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

In *Kipp* v. *Johnson*, 31 Minn. 360, 363, 17 N. W. 957, 959, this court, speaking through Mr. Justice Mitchell, said, "No man has a vested right to a mere remedy, or in an exemption from it." In that case the distinction subsequently recognized in *Campbell* v. *Holt* was stated with approval. This court said (31 Minn. 362, 17 N. W. 958):

> "But what are often indiscriminately called statutes of limitation consist of two distinct classes: *First*, statutes of limitation, properly so called, where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but *extinguishes the right*, and vests a perfect title in the adverse holder. Stocker v. Berny, 1 Ld. Raym. 741; Leffingwell v. Warren, 2 Black 599, 605; Buller, Nisi Prius, 103. The *second* class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of certain forms of action than a means of the acquisition of title. In such a case, the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property."

It is true that in *Kipp* v. *Johnson* the court considered that the plaintiff had another remedy that had not been barred

by the statute which had been repealed, but we regard the court's statement of the law as quoted above as announcing the sound and logical rule even if there be no other remedy. In *House* v. *Carr*, 185 N. Y. 453, the court said:

> "It must be borne in mind that the Statute of Limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the legislature to repeal the Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation."

We do not follow the logic of such cases as *Eingartner* v. *Illinois Steel Co.*, 103 Wis. 373, 79 N. W. 433, and *State* v. *C. & N. W. Ry.*, 132 Wis. 345, 112 N. W. 515, or the Illinois cases which regard the running of the statute as paying the debt.

We have been cited to no case where we have drawn any distinction between our interpretation of the due process clause in our state constitution and the interpretation given to the due process clause of the federal constitution by the Supreme Court of the United States. We do not find that *Campbell* v. *Holt* has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court.

Statutes of limitation which only bar the recovery of a debt or damages for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of such statutes may be lifted without violating the due process clauses of either the state or federal constitutions. See also McElowney v. Wyatt, 44 W. Va. 711, 45 L. R. A. 609; Orman v. Arsdell, 12 N. M. 344, 67 L. R. A. 438.

We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to this case.

The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, or

the Federal Employers Liability Act, and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. G. N. Ry., 92 Minn. 184, 99 N. W. 620; Kannellos v. G. N. Ry. Co. 151 Minn. 157, 186 N. W. 389; Danzer & Co. Inc. v. Gulf & S. I. R. Co. 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126.

5. Does the proviso apply to cases already pending? We think it does even though it was passed subsequent to a determination by this court that the cause was barred. On this point we can do no better than to quote from Robinson v. Robins Dry Dock & Repair Co. 238 N. Y. 271, 281, 144 N. E. 579, 582, 36 A. L. R. 1310, 1315:

> "There is some conflict of decision in the various jurisdictions as to whether a case should be determined according to the law in effect when the judgment was rendered in the lower court or according to the law in effect at the time the cause was disposed of on appeal, but both reason and the weight of authority seem to point to the view that where a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment and pending appeal, the appellate court may dispose of the case in accordance with the law as changed by the statute. We have already pointed out that in the case of Danforth v. Groton Water Co. (178 Mass. 472, 86 A. S. R. 495, 59 N. E. 1033), the Massachusetts Supreme Court upon reargument reversed a judgment of the lower court which was correct when rendered because pending the appeal the bar of the earlier statute was repealed. 'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.' (U. S. v. Schooner Peggy, 1 Cranch, 103 (2 L. ed.

49)). See, also, Dinsmore v. Southern Express Co., 183 U. S. 115 (46 L. ed 111, 22 S. Ct. 45); Un. Pac. R. R. v. Snow, 231 U. S. 204 (58 L. ed. 184, 34 S. Ct. 104))."

Since the evidence is compelling that defendant sold plaintiff unregistered stock in violation of the statute, she is entitled to recover the purchase price.

Judgment affirmed.

APPENDIX J.

In appellant's petition for rehearing to the Minnesota Supreme Court, one of the grounds urged therefor was as follows:

"Defendant respectfully requests that this petition for rehearing be granted for the above general reasons and because this Court overlooked or ignored the following:

"II. In deciding that the legislature intended to revive barred claims generally, the Court failed to consider these factual and legal matters:

"1. There is no record evidence to support such findings;

"2. Defendant had no opportunity to submit evidence on legislative intent at the original trial (the law not being in existence then) and it was denied the right to do so on its motion for a new trial. It is entitled to know the facts, if any, of which the lower Court (if it did) and this Court seemingly took judicial notice, and it is entitled to the opportunity to submit evidence to refute the erroneous assumption made. If this Court now refuses to afford defendant such opportunity (by remanding or referring the case for evidence on this issue), defendant will be

denied a fair trial and due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States and Section 7 of Article 1 of the Constitution of this state;

"3. The Court's assumption of intent, based on sources outside the record and unknown to defendant and not specified by either the trial court or this Court, is contrary to all obtainable and competent oral and documentary evidence which would show the true legislative intent—the intent of the Securities Commissioner who was the sponsor of the bill, the intent of the legislative committeemen who considered the bill, and its actual history in the legislature;

"4. An intention to revive barred claims cannot be spelled out of an assumed dissatisfaction with the *Pomeroy* case which decided only the tolling question;

"5. The finding is contrary to all reasonable interpretation and inferences from the clear language of the law and surrounding circumstances and to established rules of statutory construction applicable thereto including rules adopted by the legislature at the same time that the limitations provision was enacted (Ch. 492, § 16, *Laws of Minn. 1941*).

APPENDIX K.

STATE OF MINNESOTA.

Office of Clerk of Supreme Court.

St. Paul, Minn.

February 23, 1944.

33458

(Ruth Chase Donaldson), Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, Deceased, Substituted as Respondents, *Respondents*,

vs.

Chase Securities Corporation, Now Known as Amerex Holding Co., *Appellant*.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

Grace Kaercher Davis,
Clerk Supreme Court.

APPENDIX L.

STATE OF MINNESOTA, SUPREME COURT.

33458

(RUTH CHASE DONALDSON), FRANK A. DONALDSON and FRANK A. DONALDSON, JR., Executors of the Estate of Ruth Chase Donaldson, Deceased, Substituted as Respondents, *Respondents*,

vs.

CHASE SECURITIES CORPORATION, a Corporation, Now Known as AMEREX HOLDING CORPORATION, *Appellant*.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit: of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents herein, do have and recover of appellant herein the sum and amount of Three Hundred Eighty-Seven and 43/100 Dollars ($387.43) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed February 23, 1944.

BY THE COURT.

Attest:

GRACE KAERCHER DAVIS,
Clerk.

STATEMENT FOR JUDGMENT.

Statutory Costs, $25.00; Printer, $361.30; Clerk, $——; Acknowledgment, $.50; Return; —; Postage and Express, $.63; Appeal Bond, $——; Transcript, $——; Total, $387.43.
Satisfaction of Judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest:

——— ———,
Clerk.

By ——— ———,
Deputy.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Grace Kaercher Davis, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, February 23, 1944.

[SEAL.]

GRACE KAERCHER DAVIS,
Clerk.

By MAE SHERMAN,
Deputy.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

APPELLANT'S BRIEF IN ANSWER TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

F. H. STINCHFIELD,
S. S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS,

Appellees.

APPELLANT'S BRIEF IN ANSWER TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

As permitted by Rule 7, paragraph 3, of the Rules of this Court, appellant submits this brief in answer to appellees' Statement Opposing Jurisdiction and Motions to Dismiss or Affirm, served and filed on May 10, 1944, in opposition to appellant's appeal taken on April 22, 1944, and its Jurisdictional Statement filed on the same date.

In summary, appellees claim "that no federal questions are presented," or that, if federal questions are involved,

they are unsubstantial. Appellant's Jurisdictional Statement anticipated most of their principal claims, and therefore, this answer is restricted mainly to the errors of their argument. It will follow the titles used in their statement.

Statement of Case, Grounds of Plaintiff's Cause of Action, and History of Proceedings.

Appellees' comment under these three titles does not differ basically from that given by appellant, except as follows:

1. Appellees emphasize that the action to recover as damages the purchase price of stock, sold in violation of the registration provisions of the Blue Sky Law, was an action in tort. As we already have shown (p. 16 of Jurisdictional Statement), if "tort" be the correct descriptive word, such tort arose only from breach of a duty imposed solely by statute and not because of violation of any common law obligation. The Minnesota Supreme Court at all times has so held in identical actions to recover the purchase price of stock sold in violation of that statutory duty. That court likewise so held on both appeals of this very case.[1] So did the Eighth Circuit Court of Appeals in the similar cases of *City Co. of New York* v. *Stern* (1940), 11 Fed. (2d) 601, and *Chase Securities Corporation* v. *Vogel* (1940), 110 Fed. (2d) 607 (set forth in Appendix "A" of Appellees' Statement). But for the statute, there could have been no liability, in tort or otherwise, for non-registration of the stock.

[1] On page 10 of Appellees' Opposing Statement, it is erroneously said that the State Court held the action was in tort "(and not upon a 'liability created by statute')". Nowhere in the opinion is the quoted matter given. Rather the court described the action as one in tort for recovery of the purchase price of stock sold in violation of the securities act. In the first appeal, the same action was expressly called a suit "upon a liability created by statute".

The important question is, not whether the action was one in tort, but whether the action here involved was based "upon a liability created by statute." Every court decision, expressly or in legal effect, has held it to have been of this specific character.

2. Appellees refer to the limitations statute, Mason's 1927 Minn. Stat. Section 9191, subdiv. 2, which was held applicable to this action for breach of statute on the first appeal, *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, as being a "general" six-year statute of limitations. It is "general" only in the sense of not being specifically limited to Blue Sky actions. In every other sense, it is "special" in that it expressly covers *only* actions "upon a liability created by statute." (See. Appendix A, p. 29, Jurisdictional Statement.) It is plainly not a "catch-all" limitations provision, applicable to any kind of action, such as on contract or on tort for breach of a common law duty, or on any other obligation "as to which no other limitation is expressly prescribed".[2] This distinction is necessary to a clear understanding of the precise legal question involved.

3. Appellees say that the complaint alleged only one cause of action, having four separate grounds. Regardless of the inartistic and jumbled form of that pleading, plaintiff in reality and in law stated two separate causes of action; one for recovery based on pure breach of the registration law, and the other for fraud in sale representations. The first decision of the trial court rightly declared the statutory claim to be "independent" of the fraud claim (See Par. XXVI, Findings of Fact, Conclusions of Law and Order for Judgment, dated April 18,

[2] Such a "catch-all" limitations provision in the Minnesota law is Mason's 1927 Minn. Stat., Sec. 9191, sub. 1 (See Jurisdictional Statement, Appendix A, p. 29).

1940). The state supreme court reviewed the decision on that basis alone. Appellees thereafter proceeded on the "fraud" claim as an independent cause of action, until after the 1941 law was enacted. Those two causes of action remained separate through the adjudication from which this appeal is taken. They are still separate and distinct.

4. The variously stated additional "grounds" of recovery and the findings thereon of the trial court are all upon the "independent" cause of action for fraud. They are entirely immaterial on this appeal, as the state supreme court's own opinion clearly states.

I.

That Adherence to Campbell v. Holt Denies Appellant Due Process of Law.

a. *The Inapplicability of Campbell v. Holt:*

In its Jurisdictional Statement (pp. 16-18), appellant has urged that the case at bar is governed by the legal principles of *Davis* v. *Mills*, (1904) 194 U. S. 541, 48 L. Ed. 1067, 24 S. Ct. 692 (involving an action to recover a liability upon corporate directors for violation of a statute) and *Danzer & Co.* v. *Gulf & Ship Island Ry. Co.*, (1924) 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612 (involving an action for damages for breach of duty imposed by statute), rather than by the case of *Campbell* v. *Holt*, (1885) 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, which involved an action for breach of a common law obligation on contract to pay money.

It is significant that appellees do not attempt to analyze and distinguish the *Davis* case; and their comment concerning the *Danzer* case is inadequate. Our original argument on these cases, which we need not here repeat, remains unanswered.

The limitations statute here applied, Mason's 1927 Minn. Stat. 9191, *subdiv. 2*, is not a "general" limitations in the sense in which that term was used in *In Re Daniels*,[3] (1940) 208 Minn. 420, 294 N. W. 465, or an "ordinary" statute of limitations as the term was applied in *Kannellos v. Great Northern Ry. Co.*, (1922) 151 Minn. 157, 186 N. W. 389, to the limitations provision involved in *Campbell* v. *Holt*. Rather, its own language, expressly relating only to actions "upon a liability created by statute", shows it to be a specific statute of limitations. It is substantially as restrictive as the limitations provision involved in *Davis* v. *Mills*, which was held to condition the liability founded on a separately enacted statute rather than to affect the remedy alone.

We quite agree with appellees that there is a "difference between *Campbell* v. *Holt* and the *Danzer* case" (Appellees' Opposing Statement, p. 14). That difference is of vital importance here. The State Supreme Court's erroneous application of the *Campbell* case to sustain a legislative revival of a barred statutory cause of action raises a substantial federal question under the due process clause.

b. *The Error of Campbell v. Holt, Were It Applicable*:

Appellant's argument as to the limited applicability of *Campbell* v. *Holt*, and the need for re-examination of its doctrine on the ground of public policy, remains unmoved by appellees' statement and lengthy citation of inapplicable cases.

We again repeat what we there said (Jurisdictional Statement, pp. 18-19), that in only three states, (Connecticut, New Mexico, and Washington) has the majority rule of *Campbell* v. *Holt* been accepted in cases not

[3] The Court specifically pointed out that the Iowa limitations statute did not in terms apply to wrongful death actions; rather it covered all types of actions for injuries, whether based on contract or tort and, consequently, did not condition rights (208 Minn. at p. 429).

involving special circumstances; and in none of those was the action one based upon the violation of a statute. Excluding the decision of the Minnesota Supreme Court in the case at bar, the other five cases (of the nine claimed) contain only dicta reference to the *Campbell* case or involved special situations where the *Campbell* rule was cautiously applied and approved only as to the peculiar facts of each case.[4]

Appellees' terse statement that the Federal Courts "have never departed" from *Campbell* v. *Holt* contains a misleading implication, especially when it is applied to an action such as is involved in the case at bar. *All* of the cases cited for that claim (Appellees' Opposing Statement, pp. 19-20), merely confirm what appellant originally said (Jurisdictional Statement, p. 20)—that the federal courts have followed the *Campbell* case only as to a special statute[5] enacted in favor of the United States to enable collection of tax claims which had become

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[4] *Jackson Hill Coal Co.* v. *Commissioners* (1941), 181 Ind. 335, 104 N. E. 497, and *Aaron* v. *City of Tipton* (1941), 218 Ind. 227, 32 N. E. (2) 88 (mistakenly cited by appellees as *Hillger* v. *Boyd*), held that in actions against subdivisions of the state, the legislature may constitutionally alter limitations periods or revive barred claims.

In *Evans Products Co.* v. *Fry* (1943), 307 Mich. 506, 12 N.W. (2) 448, the *Campbell* case was approved "as applied to our construction of Act 170 (an escheat law) under the circumstances of this case". The broader principle against revival, declared by the earlier Michigan case of *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142, remains unchanged.

Beckin v. *Healy* (1916), 52 Mont. 398, 158 Pac. 1020, involved only a suit to cancel an outlawed mortgage. *Bates* v. *Collum* (1896), 177 Pa. 633, 35 Atl. 861, held a newly enacted tolling statute applicable to a previously accrued cause of action on contract against a non resident. In both cases, brief comment on the *Campbell* case was dicta and related only to revival of a barred *debt*.

McEldowney v. *Wyatt* (1898), 44 W. Va. 711; 30 S. E. 239, approved the *Campbell* case only to allow recovery of a barred claim for taxes, the opinion pointing out that "taxes are not a contract or a debt".

[5] All federal cases involved the same statute, Sec. 611 of Rev. Code of 1928 (26 U.S.C.A. Sec. 2611).

barred through "mistakes and defects in the administration of government". The special distinction in this kind of situation is aptly drawn by this Court in *Graham* v. *Goodcell* (1930) 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186, while adhering to the wisdom of a contrary rule in ordinary transactions between two persons. Similarly, a special enactment by Congress "to cure a fault of administration" of a federal compensation act was sustained by this Court on the principle and authority of the *Graham* case, it being noted especially that the result affected only an administrative order rather than a prior "judicial judgment". *Paramino Lumber Co.* v. *Marshall* (1940) 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600.

Appellees must agree with appellant that such "special situation" cases as *Robinson* v. *Robins Dry Dock & Repair Co.*, (1924) 238 N. Y. 271, 144 N. E. 579, *Danforth v. Groton Water Co.*, (1901) 178 Mass. 472, 59 N. E. 1033, *Dunbar* v. *Boston & P. R. Co.*, (1902) 181 Mass. 383, 63 N. E. 916, and *Mulligan* v. *Hilton*, (1940) 305 Mass. 5, 24 N. E. (2) 676, afford no support to their position unless the case at bar could be placed in that special category. But no claim is made that the facts here impel the result attained in those cases. Appellees' testate at all times had her six full years within which to commence the action. She slept on her rights for more than two years *after* that regular limitations period and gave no worthy reason why she did not sue within the regular time. She was not confused by any change in the prevailing law; she did not claim any technical oversight in precedural matters, or that the originally allowed six years was not reasonable, or that any special hardship existed. In other words, not one of the special circumstances found in the "special situation" cases was present or claimed here.

Appellees' effort to justify the revival on the ground that they had two separate remedies for violation of the

securities law, only one of which was barred by the first appeal, is likewise without merit. The Minnesota cases are unanimous in their view that a buyer has only one cause of action and *one* remedy for the seller's breach of that law—an action to recover the purchase price of the security sold without registration (Jurisdictional Statement, p. 16 and footnote). That cause and remedy were asserted in the trial here and were the sole basis of the first appeal. The State Supreme Court held them barred. That adjudication totally ended that cause of action and remedy, as appellees themselves conceded when, on remand, they asked only for findings on the remaining cause of action for fraud. The latter cause of action was obviously not another remedy for the same violation of statute; it was an entirely different claim, existing independently of the violation of statute, as the trial court, in its decision of April 18, 1940 (Par. XXVI), properly held.

Even the Minnesota Supreme Court, in twice deciding this case on the statutory violation claim alone, did not suggest in either opinion that there were two remedies for the same breach of statute. Rather, the opinion from which this appeal is taken discussed *Kipp* v. *Johnson*, (1884) 31 Minn. 360; 17 N. W. 957, and observed by way of distinction from the case at bar, that there "plaintiff had another remedy that had not been barred by the statute", and that, nevertheless, revival of the cause of action was proper "even if there be no other remedy". The revival cannot be sustained on the "two-remedy" principle of the *Kipp* case.

c. Public Policy and Campbell v. *Holt:*

Appellees' emphasis on the "important considerations of public policy" with reference to the rule of *Campbell* v. *Holt*, admits the presence in this case of a federal question

of substance. As appellant's summary statement said (Jurisdictional Statement, pp. 13-14), it is extremely important that this Court determine the power of a state legislature, under the due process clause, (a) to reverse a final judgment of the highest state court in a given case and as to a party in whose favor the judgment was entered, and (b) to revive a cause of action founded on violation of statute, years after the action had become barred by all existing law.

Appellees' reasons of so-called public policy against the discard of *Campbell* v. *Holt*, as applied to ordinary transactions or liabilities founded on statute, are either wholly inapplicable or without substance:

(1) As to the "established doctrines" of revival by a new promise in writing or part payment, those doctrines are statutory exceptions and, by judicial disfavor, are limited to contract obligations or debts *only*. They are not applicable to tort actions, as appellees insist this action is. *Olson* v. *Dahl*, (1906) 99 Minn. 433, 109 N. W. 1001. Furthermore, the theory supporting them is one of *new* liability rather than revival of the old obligation, *Willoughby* v. *Irish*, (1886) 35 Minn. 63, 27 N. W. 379. These and other "doctrines," if desirable, could be left unchanged by proper judicial language excepting them.

(2) As to the constitutional power to revive actions by the government to collect taxes, there is already adequate judicial authority in such cases as *Graham* v. *Goodcell* and *Paramino Lumber Co.* v. *Marshall*, *supra*, neither of which is dependent upon the rule of the *Campbell* case.

(3) The so-called "injustice" cases must necessarily stand on their own peculiar facts and circumstances as to which, if necessary, the rule of the *Campbell* case might well be limited.

(4) The retrospective change of rights and remedies by legislatures raises a question of public policy which is

vastly affected by whether or not the action has already become barred by all existing law. Whether legislatures can be trusted not to abuse a power to revive claims barred years before, is indeed a vital matter of public law.

The public policy in favor of the permanent barring of "ancient claims", so strongly urged by Justices Bradley and Harlan in the dissenting opinion of *Campbell* v. *Holt*, had been established by this Court more than fifty years before that case, when, through Mr. Justice Story in *Bell* v. *Morrison*, (1828) 26 U. S. (1 Pet.) 351, at 360, 7 L. Ed. 174, at 178, the statute of limitations was described as "'a wise and beneficial law" designed "to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses." That approval has been reaffirmed in numerous cases, such as *Campbell* v. *Haverhill*, (1894) 155 U. S. 610, 617, 39 L. Ed. 280, 15 S. Ct. 217, and *Guaranty Trust Co. of N. Y.* v. *United States*, (1937) 304 U. S. 126, 82 L. Ed. 1224, 58 S. Ct. 785. Recognition of legislative power to revive causes of action barred ten or twenty years ago[6] would defeat that public policy, acknowledged and respected by this Court for more than a century, and would lead to innumerable abuses and legally undesirable consequences which here need only be suggested.

Sixty years' experience with *Campbell* v. *Holt* has demonstrated that the majority of the state courts have rejected its rule. Furthermore those sixty years have also shown what appellees do not and cannot deny; that the majority of the legal analysts and authorities have rejected it, both as a matter of legal principle as well as of public policy; that this Court has never re-affirmed it in a case involving

[6] As the statute in the case at bar was construed, it revived for one year *all* causes of action for violations of the securities law occurring since it was first enacted in 1917.

revival of a cause of action founded either on statute or on common law debt or contract; and that some of the lower federal courts have approved it only to sustain the revival of tax collection claims, which by the later decision of this Court in *Graham* v. *Goodcell, supra*, confirmed such result in that restricted situation, but without citing or relying upon the *Campbell* case or its doctrine.

This should be enough to justify a re-examination of that case by this Court.

II.

That 1941 Law, as Construed and Applied, Denies Due Process Because Appellant Had "Vested Right" in Judgment of Reversal on First Appeal.

Appellant's authorities on this point (Jurisdictional Statement, pp. 14-15) are not questioned by appellees. Appellees seem to admit that if the adjudication of the action for violation of the registration law was final on the first appeal, the legislature could not constitutionally abrogate appellant's vested right therein. Their sole answer is that that adjudication was not final.

The record is simple. The trial court by findings of fact, conclusions of law and order for judgment, dated April 18, 1940, held that the stock sales were in violation of the registration provisions (Par. XV and XVII); this was the only basis of recovery there decided (Par. XXVI). Judgment for appellees was entered on June 18, 1940. On appeal, the State Supreme Court on March 7, 1941, entered a judgment reversing the trial court judgment. (Jurisdictional Statement, pp. 41-42). The opinion of January 10, 1941, said as to the issues remaining:

> "This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."

Appellees repeatedly say that only the so-called "tolling" question was thereby decided. A reading of the opinion (or the opinions in the *Stern* and *Vogel* cases) shows that that adjudication necessarily included an adjudication that the cause of action was barred by the limitations statute, else the question of tolling would have been wholly moot. The only issue or cause of action which could possibly have remained was one for alleged fraud. Even appellees so construed the Supreme Court's language because their next step in the trial court was a motion for findings on the *fraud* claim only.

The state Supreme Court has always held that the effect of a reversal depends on the grounds of the reversal as expressed in the court's opinion. As said in *Jordan v. Humphrey* (1884), 32 Minn. 522, 21 N. W. 713:

> "A judgment may be reversed upon grounds which show that it is impossible for plaintiff to recover. In such case a new trial would be useless, and the reversal is in effect an end of the case."

This is clearly the situation here, as to the claim for violation of the Blue Sky Law.

On this undisputed record, it is inconceivable that appellees could have successfully re-commenced an action on that claim—else there would never be an end to litigation. As this Court said long ago in *United States v. Leffler* (1837), 11 Pet. (U. S.) 86, at 100-1, 9 L. Ed. 642:

> "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judicatum*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

See, also, *Hamer v. New York Railways Co.* (1916), 244 U. S. 266, 61 L. Ed. 1125, 37 S. Ct. 511.

Inasmuch as the facts upon which the state Supreme Court in its decision of January, 1941, determined that appellees' action was barred were not in controversy, the decision was substantially that of a judgment entered on a demurrer to the pleading. In fact, that was precisely the situation in the companion case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 518. There are numerous cases of this Court holding that a decree dismissing a complaint as a matter of law, on grounds apparent on its face, is a conclusive adjudication on the merits, *Lawrence* v. *Nelson* (1891), 143 U. S. 215, 36 L. Ed. 130, 12 S. Ct. 440; *Lyon* v. *The Perin and Gaff Mfger. Co.* (1887), 125 U. S. 698, 31 L. Ed. 839, 8 S. Ct. 1024. It is just as much so as a judgment rendered upon proof. In both cases, such a judgment is res adjudicata. *Northern Pacific Ry. Co.* v. *Slaght* (1906), 205 U. S. 122, 51 L. Ed. 738. See Annotations in *13 A. L. R. 1104*, supplemented in *106 A. L. R. 437*.

Even the case recurrently cited by appellees, *City of Aurora* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42, holds, contrary to their apparent analysis, that a judgment entered on a demurrer is a final judgment and is res adjudicata as to a new action upon the same cause between the same parties. Any other rule would be preposterous.[7]

The other case cited, *Hickey* v. *Johnson* (1925, C. C. A. 8th Cir.) 9 Fed. (2) 498, likewise approved the rule that a judgment on demurrer is as conclusive as one rendered upon proof, where the grounds stated involve the merits.[8]

Appellees' claim that the first appeal decided nothing on the merits of the cause of action for violation of statute and that, on remand, the case stood "as if no trial had been

[7] The portion of that opinion quoted by appellees is part of a hypothetical discussion, qualified in the very next sentence by reference to intermediate procedural orders as distinguished from decisions on the merits.

[8] The portion of the opinion quoted by appellees refers only to a rule of trial practice under Oklahoma law.

had" is obviously in error. So, also, is the statement that the 1941 law did not change the rule of law announced on the first appeal (Appellees' Opposing Statement, p. 29). Both are contrary to the clear language of the State Court's opinion.

Furthermore, this Court has already ruled that the first appeal did decide finally the cause of action for violation of statute. In *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, 61 S. Ct. 823, on the basis of these same adjudications by the State Court in this and the companion *Pomeroy* case on the first appeal, the lower court judgment on the statutory cause of action was reversed and the case was remanded to the Circuit Court of Appeals "for further proceedings with respect to any question not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

Equally unfounded is the related argument that this cause of action was pending after the remand and when the 1941 law was passed.[9] Not one of the *Minnesota* cases or the decisions of this Court (or of any court) cited by appellees sustains such a claim. In all of them the actions were obviously pending, prior to trial or upon appeal. The case at bar was not pending as to the cause of action for violation of statute, after the judgment on the first appeal. The reversal merged the claim in the adjudication and put an end to that phase of the case, just as much as if it had been the subject of a formally stated separate action. The fact that the case continued on as to "any question *not* determined" by that appeal could not give life and pend

[9] This argument rests fundamentally on the claim that because both causes of action were pleaded in jumbled form in the one complaint, the adjudicated cause continued to pend merely because further proceedings were allowed as to the other cause of action (fraud). Obviously, appellees' inartistic pleading cannot affect the separate legal status of the two causes of action, or form the basis of a ground for denying the existence of a real and substantial federal question.

ency to the question which, as this Court said, had been finally determined.

Even assuming that a legislature may have the power to alter the rights of parties as they are involved in a *pending* case (such as *Carpenter* v. *Wabash Ry. Co.* (1939), 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416), none of such cases is applicable to the finally adjudicated cause of action at bar. Nor does any one of such cases cited by appellees (Opposing Statement, pp. 34-35) so much as intimate that this phase of the case was pending after March 7, 1941, when judgment of reversal was entered. Rather, subsequent to that date, such judgment could not be collaterally attacked by legislative act, *McCullough* v. *Virginia* (1898), 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134, or by a separate judicial proceeding, *Larkin* v. *Paugh* (1927), 276 U. S. 429, 72 L. Ed. 638, 48 S. Ct. 366; *Chicot Co. Drainage District* v. *Baxter State Bank* (1939), 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317.

The judgment on the first appeal was final and decisive of the cause of action for breach of statute. Appellant's vested right therein was taken away by the 1941 law, as construed and applied by the Minnesota Supreme Court.

III.

That 1941 Law, As Construed and Applied, Denies Appellant Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment.

Appellees do not question the validity of appellant's authorities holding that this Court is bound by the specific construction and application of the statute as given it by the state supreme court. It is entirely immaterial that the statutory language itself, being general in form, could have been given some less objectionable or broader construction and application. (Jurisdictional Statement, pp. 21-22).

The sole question on this point is whether the statute, as construed and applied by the state court, is unreasonable, arbitrary and discriminatory. If so, there has been a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment.

We again submit that the opinion shows just such an unconstitutional construction and application as against appellant and National City Company. (See excerpt in Jurisdictional Statement, page 21.) It plainly appears, so the state court said:

> —that the legislature acted promptly after the first opinion which was in favor of these two corporations;
>
> —that the legislature "was dissatisfied with the law" made in that opinion;
>
> —that the legislature "regarded it as unjust to numerous plaintiffs who had bought *this* stock" and had cases pending or causes of action thereon.
>
> —that the legislature knew of a multitude of sales of this stock in Minnesota in 1929 and that the "great bulk of the violations" of the law occurred prior to the crash in 1929.
>
> —that "if the clause * * * were to be interpreted as defendant contends, it would apply to few, if any, cases".

Within this array of finding of specific legislative intent against appellant and National City Company, there is only one incidental reference to "other unregistered stock", concerning which there was no proof in the record. Surely those three words could not alter the clear construction and interpretation of two lengthy paragraphs that the law was intended to apply only to these corporations and to purchasers of "*this stock*", in order to overcome the claimed injustice of the prior decision. The language is specific. The court was not pointing out, as appellees say,

only "*some*" of the circumstances which it believed led to the enactment of the law; it was pointing out *all* of such circumstances in a deliberate manner.

Its reference to such extraneous matter (the truth of which we deny) was determinative and vital to the decision, not merely confirmatory of the statutory language, as appellees claim. This is apparent in at least two respects: (1) the length, particularity, and emphasis placed on the circumstances enumerated by the court, and (2) its reliance on such circumstances to support its conclusion that the law must be construed as though the word "provided" had not been used by the legislature. In other words, the inference is plain from this opinion that such reference was necessary, not to clarify and confirm, but rather to *remake* the purportedly "clear" statutory language in order to reach the desired result. Without such reference, it could not have escaped the actual words of the statute.

This question of denial of equal protection was seasonably raised on the petition for rehearing. Until the opinion of the State Supreme Court no one anticipated the construction of the 1941 law which was there given. Appellees never argued for such a restricted construction, orally or by brief. Even now they seek to disclaim it. No evidence was ever taken on the question to indicate the possible findings of legislative intent so made. The trial court made no such finding of intent, its determination on the applicability of that law being limited to one short paragraph (Third paragraph of Finding XXXII, quoted in Jurisdictional Statement, p. 7), which, on motion for a new trial, dated September 8, 1942 (by paragraph No. 13) the trial court refused to clarify by elaboration.

Such unusual and unexpected disposition of the question of legislative intent brings this case within the principle

of such cases as *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, (1930) 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326, and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, (1930) 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, where the federal questions were raised for the first time on petitions for rehearing before the state supreme courts and where it could "not reasonably be held that the company was bound to anticipate such a construction". In both said cases, the state courts denied the petitions for rehearing without opinions; yet this court held such questions seasonably raised.

The 1941 law was construed by the state court to be a special law against this appellant. That construction is binding on this Court. Appellant thereby was denied equal protection.

IV.

That Appellant Was Denied a Fair Trial.

Appellees' principal answer to this claim is that appellant did not seasonably urge this federal question and that, if it did, the state court did not and could not base its decision on findings of legislative intent drawn from "extraneous materials".

That appellant raised the fair trial question at its first opportunity has already been fully shown (Jurisdictional Statement, pp. 24-25). It is said that appellant could have offered evidence on the issue of legislative intent to the trial court—yet it is not shown how or where this could have been done. The trial of the case was had and closed two years before. We did all that established Minnesota trial practice allowed, in making a motion to clarify the court's ambiguous finding with respect to the applicability of the law, and in the alternative, for a new

trial. Both motions were denied. Furthermore, until the state supreme court had based its decision primarily on the question of intent, as to which there was absolutely no evidence introduced in the record, such construction of the law, as we have said, was entirely unanticipated by both sides. Appellees themselves did not contend for such a narrow construction. The matter of proof of the issue of intent, by facts, and circumstances outside the record (as distinguished from the question of legislative intent as disclosed by the statutory language itself), was in reality not involved in the case until that decision. Appellant then proceeded promptly as to it, on its petition for rehearing. The decisions just cited, showing timeliness in presentation of the equal protection question at such stage of the state court appeal, are applicable and decisive here also.

It seems a bit incongruous that, in the face of the supreme court's obvious reliance on so-called background "circumstances" to sustain its construction of the law, (as shown above under Section III), appellees should now argue that such matters were "inadmissible" and that any evidence of them "could not have been received." They take the inconceivable position here that the state court can refer to and rely on such matters, provided that no evidence thereon is admitted in the case. The very case they cite, *United States* v. *Missouri-Pacific Ry. Co.*, (1928) 278 U. S. 269, 73 L. Ed. 322, 49 S. Ct. 133, supports a contrary conclusion where, as here, the literal language of the law would "lead to absurd or impracticable consequences."[10] The fact remains that the state supreme court did resort to such extraneous circumstances, as a matter of judicial

[10] As appellant argued in the state supreme court, the construction here approved would revive for one year *all* causes of actions for violation of the state securities law *since its enactment in 1917*.

notice as appellees' argument seems to concede, without giving appellant the slightest opportunity to ascertain the "facts" so used and to offer proof of contradicting facts. This is a violation of the clearly stated principle of *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, (1937) 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. (Jurisdictional Statement, p. 26.) Appellees do not challenge the rule of that case or its applicability here.

Appellees also argue that proof of the kind appellant offered (legislative records, on affidavit of a chief proponent of the proposed law, and affidavits of two legislators on the judiciary committee who examined the bill) is not competent proof of legislative intent. The quoted language from the case of *United States* v. *Trans-Missouri Freight Association* (1896), 166 U. S. 290, 41 L. Ed. 1007, at 1020; 17 S. Ct. 540, is dicta; the opinion shows that debates and reports from various members of Congress were received and considered. This is the modern trend.

In numerous cases, this Court has fully examined and relied upon statements from individual members of Congress, both proponents and opponents of bills, to determine the intent and purpose of an act. See for example, *Helvering* v. *Griffiths* (1943), 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636; *United States* v. *Wrightwood Dairy Co.* (1942), 315 U. S. 110, 86 L. Ed. 726, 62 S. Ct. 523; *United States* v. *Dickerson* (1940), 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034; *United States* v. *Dotterweich* (1943), — U. S. —, 88 L. Ed. 74, — S. Ct. —. The same rule prevailed in Minnesota at the time this case was before the state supreme court. *Barlau* v. *Minneapolis-Moline Power Co.* (1943), 214 Minn. 564, 9 N. W. (2) 6. In all events, if the state Supreme Court believed it necessary to discuss and rely on such details of legislative intent, the parties should have the right to submit all available proof on the

issue. Otherwise, legislative intent would indeed be a fiction, incapable of any factual contradiction.

Finally, it is said that the foregoing presents no federal question because the construction and interpretation of a state law, or a question of admissibility of evidence, is solely for the highest state court to determine. Such a claim totally ignores a fundamental rule that even though the ultimate question is one of state law, the adjudication of that question must afford both parties a fair opportunity to be heard. If such opportunity is denied, a federal question under the due process clause is present. Thus, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra*, the interpretation of a Missouri state tax law was admittedly one solely for the courts of that state. The state court judgment was reversed, however, because a fair trial had not been granted appellant. This Court said:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 475, 476, 62 L. ed. 1215, 1220, 1221, 38 Sup. Ct. Rep. 566."

See also, *Baltimore & Ohio Ry. Co.* v. *United States* (1925), 268 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797. Appellees' cases presuppose a fair trial and full opportunity to be heard. They are not here in point.

The State Court's opinion demonstrates the determinative importance of the issue of legislative intent. Appellant

has not yet had an opportunity to present evidence on that issue. A fair trial has been denied, and, thereby, a substantial federal question is presented.

Conclusions.

For all the reasons given in our Jurisdictional Statement, we respectfully submit that appellees' motions to dismiss or affirm be denied and that this appeal be allowed.

Dated: May 27, 1944.

Respectfully submitted,

F. H. Stinchfield,
S. S. Jennings, Jr.,
Counsel for Appellant.

John M. Palmer,
Floyd E. Nelson,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

RUTH CHASE DONALDSON, FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

F. H. SPINCHFIELD,
S. S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS,

Appellees.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLANT

This is an appeal from the judgment of the Supreme Court of Minnesota, entered herein on February 23, 1944, affirming the judgment of a District Court.

I

Opinions Below

The opinion of the Supreme Court of Minnesota, upon which was entered the judgment from which this appeal is taken, is reported in 216 Minn. 269, 13 N.W. (2d) 1 (R. 401-409).

The opinions of the same court, which were rendered on January 10, 1941, in the same case and in the related case of *Pomeroy* v. *National City Company*, and which are directly involved on this appeal, are reported as follows: *Donaldson* v. *Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518 (R. 362), and *Pomeroy* v. *National City Company*, 209 Minn. 155, 296 N. W. 513 (R. 353-362).

II.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended, and, also, in the alternative, under Section 237 (c) thereof, as a petition for certiorari, if the case be not the proper subject of a petition for appeal under Section 237 (a). The judgment, from which the appeal is taken, is a final one in the highest court of that state (R. 475). It drew in question the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The petition for appeal was presented on April 22, 1944 (R. 475). This Court noted probable jurisdiction on October 9, 1944 (R. 487).

The specific grounds upon which the jurisdiction of this Court is invoked are given in appellant's Jurisdictional Statement, previously filed herein pursuant to Rule 12 of the Rules of this Court, and in appellant's brief in answer to appellees' statement opposing jurisdiction, previously filed herein pursuant to Rule 7. Reference is hereby made to each of these documents.

III

The Minnesota Statute Whose Validity Is Involved

Minnesota Statutes, 1941, Section 80.26, was passed on April 28, 1941, as Section 18, Chapter 547, Laws of Minnesota for 1941, being a part of a general revision of the Minnesota Securities (Blue Sky) Law, to become effective on July 1, 1941. It provides (the italicized portion being the basis of the judgment from which this appeal is taken):

"3996-24. Other actions or prosecutions not limited.—No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, *provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date*, and provided further that no purchaser of a security otherwise entitled thereto shall bring any action for relief of the character above set forth who shall have refused or failed, within 30 days after the receipt thereof by such purchaser, to accept a written offer from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of repayment, such interest to be computed at the same rate as the fixed interest or dividend rate, if any, pro-

vided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser on such securities. Any written offer so made to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commissioner of securities prior to the delivery thereof to such purchaser.

"Nothing in this section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the state to punish any person for any violation of law."

IV

Statement of the Case

The Minnesota Supreme Court held: (a) that the state legislature enacted the italicized clause of the statute because it was "dissatisfied" with the decision and final judgment of that same court in this very same case, entered in appellant's favor several months prior to the passage of the law and which declared appellee's cause of action for violation of the Blue Sky law barred; (b) that the clause was intended to revive barred causes of action for breach of the Blue Sky law and that it in legal effect nullified the final judgment and permitted appellee to recover on such barred cause of action, and (c) that the legislature had the power to do so under the due process clause of the federal constitution.

This decision and judgment thereon were entered over appellant's contentions that the statute, as so construed, violated the due process clause of the Fourteenth Amendment; that it constituted unreasonable class legislation in violation of the equal protection clause; and that appellant had been denied a fair trial, contrary to due process, on the issue of legislative intent.

Appellant urges each of such contentions on this appeal as a separate ground for reversal of the judgment.

1. *General Nature*

The action was brought in the lower Minnesota court in November, 1937, to recover the purchase price of certain combined shares of stock of appellant (then known as Chase Securities Corporation) and The Chase National Bank, which were sold by appellant to appellees' testate[1] in Minneapolis eight years before, on August 10, 1929. The suit was based on two separate causes of action: first, that the sale of the security, without registration under the Blue Sky Law of Minnesota,[2] was in violation of that law and void, and second, that appellant committed common law fraud in sale misrepresentations (R. 1-11).

2. *Rulings of Trial Court and Prior Appeal to Minnesota Supreme Court.*

The case was tried by the court without a jury in 1939, on both causes of action (R. 24, f. 81). On April 18, 1940, the trial court made findings of fact and conclusions of law on the one cause of action only of statutory violation, holding that the stock was subject to the registration provisions of the Minnesota Blue Sky Law, that such law had been violated by failure to register the stock, and that the six year statute of limitations, expressly covering actions "upon a liability created by statute" (Mason's 1927 Minn. Stat., Sec. 9191, subdiv. 2, now known as Minn. Stat. 1941, Section 541.05 (2)) had been tolled by the withdrawal of appellant from Minnesota in 1931 as permitted by statute (R. 244-259, ff. 1061-1082).

[1] While the second appeal in the state court was pending, the plaintiff died, and appellees were substituted as her representatives. The designation "appellee" is here used.

[2] Chapter 80, Minn. Stat. 1941, then known as Sec. 3996-1 to 28, Mason's 1927 Minn. Stat.

From the final money judgment entered on these findings on June 18, 1940, for the amount of the purchase price paid by appellees for the stock, plus interest and less dividends received, appellant appealed to the Supreme Court of Minnesota (R. 274-276, ff. 1096).

On *January 17, 1941*, that court reversed the trial court judgment, holding (by reference to the companion case of *Robinson v. National City Company*, 209 Minn. 155, 296 N. W. 513, see opinion at R. 353-362) that the cause of action predicated upon a violation of the registration provisions of the securities law, had been barred by such six year statute of limitations, and that the withdrawal of appellant from Minnesota, having left agents for service of process as required by the Minnesota Corporation and Blue Sky Laws, did not toll the statutory period. A judgment reversing the trial court judgment of June 18, 1940, was entered by the State Supreme Court on *March 7, 1941*, and the case was remanded for determination of the remaining issue of fraud, *Donaldson v. Chase Securities Corporation*, 209 Minn. 165, 296 N. W. 518. (See opinion at R. 362, ff. 1765, judgment of reversal at R. 363, and mandate at R. 276, ff. 1106.)

3. Rulings of Trial Court After Remand

On *April 4, 1941*, appellee filed alternate motions in the trial court "for an order supplementing and correcting" the previous findings of April 18, 1940, or for a new trial, with reference only to the cause of action based on fraud (R. 277, 284, ff. 1101-1113).

While such motions were pending and on *April 22, 1941*, the Minnesota Legislature enacted a general revision of the Blue Sky Law, known as Chapter 547, Laws of 1941, which became law on April 28, 1941. Section 18 thereof (quoted on page 3 hereof), although entitled as an amendment of Section 3996-24, Mason's 1927 Minn. Stat., was substan-

tially a new section providing a specific statute of limitations for Blue Sky actions.

The parties in May, 1941, made cross-motions for amended findings, appellee moving for an additional finding that appellee's cause of action, based on a violation of the Blue Sky Law, was "revived" by the above mentioned 1941 Statute (R. 285-286, ff. 1113-1116).

Appellant moved for findings in its favor (R. 287-294, ff. 1116-1127), and objected specifically to this proposed finding of revival, upon the ground that the statutory cause of action had already been adjudged barred by the State Supreme Court in this very case under the then existing statute of limitations, and that the 1941 law did not apply to this case and could not revive such barred action (R. 292, f. 1124; R. 293, f. 1126; R. 294, f. 1126).

The trial court, on June 27, 1942, filed findings of fact and conclusions of law for appellee, and on the reasserted cause of action for statutory violation, found (third paragraph of Findings XXXII, at R. 313-314, f. 1157):

> "In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, Secs. 3956-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota."

Appellant on September 8, 1942, moved to amend the court's finding as to the 1941 law (R. 317-335, ff. 1164-1215), by striking out the above paragraph (R. 323, f. 1173, par. No. 22) and conclusions of law and substituting in lieu thereof a conclusion of law (R. 326, f. 1177) that the action was barred and not revived by the 1941 law, or, in the alter-

native, for a new trial, upon these grounds: that there was no competent evidence to support such finding of fact or conclusion of law (R. 328, f. 1180, par. No. 1); that the cause of action, if any, for violation of the securities law was barred by the final adjudication of the State Supreme Court in this very case (R. 328, f. 1180, par. No. 4); that the cause of action was barred by the applicable statute of limitations; that the 1941 law could not apply to this case and did not, and could not, revive the barred cause of action (R. 328, f. 1180, par. No. 6); and, if so applied, it would deprive appellant of its property without due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment to the United States Constitution (R. 338, f. 1195-1196, par. No. 13).

These motions were denied in their entirety (R. 350-351, ff. 1216-1218), and judgment for appellee was entered on November 25, 1942 (R. 351-352, ff. 1218-1223).

4. *The Second Appeal to Minnesota Supreme Court, Resulting in Judgment upon Which This Appeal Is Based.*

On the second appeal to the Supreme Court of Minnesota, appellant assigned errors (R. 364-400, ff. 1768-1815) in the denial of appellant's alternative motions for amended findings of fact, conclusions of law and order for judgment, or for a new trial in its favor (R. 364, f. 1678, par. No. 4), and included specifically the findings of fact and conclusions of law relating to the construction and application of the 1941 law.[1]

[1] Specific assignments of error covered the making of Finding of Fact XXXII to the effect that the 1941 statute applied and extended the appellee's time to bring the statutory cause of action, and the denial of appellant's motion to strike said finding and conclusions of law based thereon, or for a new trial (R. 384-385, ff. 1794-1796, par. No. 31); and the denial of appellant's motion to substitute a conclusion of law that the action was barred and not revived by the 1941 law (R. 398-399, ff. 1853-1854, par. No. 42a).

These assignments of error were argued in the briefs of both parties. Appellant stressed particularly the absence of legislative power under the due process clause of both state and federal constitutions, to revive a barred statutory cause of action, especially where the state Supreme Court had already adjudged that appellee's cause of action for violation of law no longer existed.

The State Supreme Court by its decision rendered on December 31, 1943 (R. 401-409) held: (a) that appellant's failure to register the stock in Minnesota in 1929 constituted a violation of the securities law; (b) that the legislature had in mind this appellant and its sales of stock in this state in 1929 and specifically intended to overcome the effect of the decision on the prior appeal in this case and in the companion case of *Pomeroy* v. *National City Co.*, and to allow purchasers of such stock one year from July 1, 1941, to commence suits against this appellant on causes of action for statutory violation as to sales of this particular stock, and (c) that the legislature had the power under the due process clauses of both state and federal constitutions to revive plaintiff's cause of action for violation of the statute in this very case, already declared barred by the court on the prior appeal. The principal authority cited for these conclusions was the case of *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, concerning which the Minnesota Supreme Court said, in part:

> "We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court."

The opinion said that the rule of the case of *Danzer & Co., Inc.* v. *Gulf & Ship Island Ry. Co.* (1935) 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612, was not applicable.

The decision was based solely on this one issue (R. 402-403, f. 1818). Judgment for appellee for the purchase price of the stock was affirmed.

Appellant filed a petition for rehearing (R. 410-463, ff. 1836-1915), wherein it again contended that the statute, as so construed by the court, denied appellant its property without due process of law as guaranteed by the due process clause of Section One of the Fourteenth Amendment to the Federal Constitution for the reasons above stated (R. 438-446, ff. 1877-1888, Points III and IV); that the law, as so construed and applied by the court, violated the equal protection clause of Section One of the Fourteenth Amendment in that such law, as so construed, constituted class or special legislation against appellant and in favor of purchasers of its stock (R. 446-452, ff. 1889-1897, Point V).

Appellant also urged upon the petition for rehearing that the Court's finding that the legislature intended to revive barred claims generally was made without record evidence in support thereof (R. 416-438, ff. 1845-1877); that the appellant had no opportunity to submit evidence on legislative intent at the original trial (the law not being in existence then); that it was denied the right to do so on its motion for a new trial; that it was entitled to know the facts of which the Supreme Court seemingly took judicial notice; that it was entitled to an opportunity to submit evidence to refute the erroneous assumptions made; and that if the Supreme Court of Minnesota refused to afford appellant such opportunity (by remanding or referring the case for evidence on that issue), appellant would be denied a fair trial and due process of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 412-413, ff. 1840-1841, Point II, R. 417-420, ff. 1845-1852).

The petition was denied without opinion on February 23, 1944 (R. 474, f. 1936), and the judgment, upon which this appeal is based, was entered on the same day (R. 475, f. 1937).

The federal questions were properly and promptly raised and preserved in the state courts.

Such judgment does not rest on a state ground which independently and adequately supports it. If the statute in question, as here construed and applied, is found by this Court to be violative of the due process or equal protection clauses of the Constitution of the United States, the judgment must be reversed.

V

Specification of Errors

The Supreme Court of Minnesota erred in holding, contrary to the timely contention of appellant:

1. That said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution, even though such construction results in the abrogation of a previous adjudication of the Supreme Court of the State of Minnesota between the same parties in the same case, *Donaldson v. Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518.

2. That said Law, as construed and applied in this case, does not deprive appellant of its property without due process of law in violation of such Fourteenth Amendment, even though such construction results in the revival of a statutory cause of action for breach of the Minnesota Blue Sky Law which had become barred by the then applicable Minnesota statute of limitations covering actions "upon a liability created by statute."

3. That said Law, as construed and applied in this case, does not violate the equal protection clause of such Fourteenth Amendment, even though such construction results in class or special legislation which was found by the Court to have been specifically intended to impose liability upon appellant and one other corporation and in favor of the purchasers of stock from these specific corporations.

4. That appellant was not entitled to a trial, as guaranteed by the due process clause of such Fourteenth Amendment, on the vital issue of intent of the state legislature, on which issue the Court found without trial that the legislature specifically intended to reverse a rule of law already declared by the Court in appellant's favor in this very case, and to impose liability upon appellant and in favor of the owners of a particular stock sold by appellant contrary to the previous final adjudication between the parties in this case.[1]

VI

Argument

Summary

Appellant submits that the 1941 Minnesota statute, as construed and applied by the State Supreme Court violated the due process and equal protection clauses of the Fourteenth Amendment for the reason:

1. That the law reversed a prior and final judgment of the highest court of the state in the same case, as to appellant in whose favor such judgment had been entered on the

[1] A ground of error, not itself a basis for appeal but includable as error to be assigned on appeal from a judgment sustaining the validity of a state statute against a claim of unconstitutionality. *Prudential Insurance Co. v. Cheek* (1921), 259 U. S. 530 at 547, 66 L. Ed. 1044, 42 S. Ct. 516, and *Fleitmann v. Welsh* (1944), 321 U. S. 253, 88 L. Ed. 475, 64 S. Ct. 548.

merits of the claim that the statutory cause of action was barred.

2. That the law revived a cause of action against appellant, founded upon breach of a statute, long after that cause of action had become barred under previously existing law.

3. That the law was one enacted for the specific purpose (so the State Supreme Court found) of reversing a rule of law previously established by the highest court of the state in this very case, so as to allow an arbitrary class of litigants to maintain already barred actions against two particular corporations including this appellant.

Appellant also submits that the judgment of the State Supreme Court violates the due process clause guaranteeing a fair trial, because it is predicated upon a finding of legislative intent with reference to the 1941 statute made by the Supreme Court, seemingly by its judicial notice of "facts" as to which the appellant did not have the opportunity to ascertain and hear evidence and to dispute such evidence by other proof or argument.

Points and Authorities

1

The 1941 law, as here construed and applied, deprives appellant of its property without due process of law, because it reverses a prior and final judgment of the highest state court in the same case in favor of appellant, in which judgment appellant had a vested right.

(Specification of Error No. 1)

The judgment of the State Supreme Court, entered in this case on March 7, 1941, as the determination of the first appeal, was a final judgment based upon an opinion in

favor of appellant upon the one issue there presented: whether the cause of action for breach of the registration statute had become barred by the statute of limitations (opinion, R. 353-363, and judgment, R. 363). It reversed a trial court decision that the action for violation of the registration statute was not barred (See Par. XV, (R. 252-253), par. XVII (R. 254), and par. XXIII (R. 257) of Findings of Fact.) That decision was confined to that one cause of action which the trial court had expressly found to be "independent" of the fraud-claim (See par. XXVI (R. 258)).

The State Supreme Court remanded the case for further proceedings on "issues other than" the statutory cause of action. The only issue which remained was the "independent" cause of action for alleged fraud, and that alone. Even appellee so construed the opinion and judgment because her next and only step in the trial court was an alternate motion for findings or a new trial only on the "issues of fraud, implied fraud, and fraud by concealment" (R. 277-282, at R. 282, f. 1109).

The statutory cause of action at all times was litigated by both parties and decided by both the trial court and State Supreme Court as though it had been alleged in a pleading entirely separate from the fraud claim. It was a separate cause of action in every sense, even though it was inartistically pleaded in combination with the cause of action for fraud. A money judgment was entered in the trial court upon that cause of action. If no appeal had been taken, it would have finally disposed of the entire case. The State Supreme Court judgment of reversal on the first appeal was decisive and final as to that cause of action.

There was nothing novel in the Court's treatment of the violation of the Blue Sky law as creating a separate and distinct cause of action, complete in itself. It was done in *Burzinski* v. *Kinyon Investment Co.* (1934), 192 Minn.

335, 256 N. W. 233, where both fraudulent representations and violation of the Blue Sky law were relied upon. It was done in *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, 239 N. W. 672, where suit was brought under a similar type of statute making it unlawful for directors to accept deposits in an insolvent bank. It is in line with the well-settled rule in Minnesota that a violation of the Blue Sky law without proof of more, confers a right on the purchaser to recover the consideration paid for unqualified securities. *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672; *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806; and see footnote 5 on p. 23, infra.

This Court has also considered exactly the same type of case arising out of similar litigation in the Federal Court, where the plaintiff relied upon the same two causes of action, one for breach of the registration statute and one for alleged fraud in sales representations, which were pleaded in substantially the same form and manner as in the case at bar. (See record on application for certiorari to this Court in *Chase Securities Corporation* v. *Vogel*, *infra*, at pp. 16-21.) In *Chase Securities Corporation* v. *Vogel* (1940), 110 F. (2d) 607, the Circuit Court of Appeals for the Eighth Circuit, relying on Minnesota law, treated the cause of action for violation of statute as a distinct cause of action, and held that it was not barred by the tolling provision of the statute of limitations and affirmed the judgment of the District Court on this cause of action alone. In *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, 61 S. Ct. 823, the judgment of the Circuit Court was reversed on the authority of the judgment of the Minnesota court in the case at bar (R. 362) and in the related case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513 (R. 353-362). The *Vogel* case was remanded to the Circuit Court of Appeals "for further proceedings

with respect to any question not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases." This Court thus recognized that the prior judgment in this case was an adjudication of the statutory cause of action and relied upon it as final.

Such conclusion is well sustained by principles of law established by this Court. The State Supreme Court's decision in January, 1941, was a determination of law and was similar to that of a judgment entered on a demurrer to the pleading. In fact, that was the situation in the companion case of *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513. There are numerous cases of this Court holding that a decree dismissing a complaint as a matter of law, on grounds apparent on its face, is a conclusive adjudication on the merits. *Lawrence* v. *Nelson* (1891), 143 U. S. 215, 36 L. Ed. 130, 12 S. Ct. 440; *Lyon* v. *The Perin and Gaff Mfger Co.* (1887), 125 U. S. 698, 31 L. Ed. 839, 8 S. Ct. 1024. It is just as much so as a judgment rendered upon proof. In both cases, such a judgment is *res adjudicata*. *City of Aurora* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42; *Northern Pacific Co.* v. *Slaght* (1906), 205 U. S. 122, 51 L. Ed. 738. See Annotations in 13 A. L. R. 1104, supplemented in 106 A. L. R. 437.

It is inconceivable, therefore, that appellees could have successfully sought a new trial, or recommenced an action on that claim. As said long ago by the State Supreme Court in *Jordan* v. *Humphrey* (1884), 32 Minn. 522, 21 N. W. 713:

> "In such case, a new trial would be useless, and the reversal is in effect an end of the case."

This Court said, in *United States* v. *Leffler* (1837), 11 Pet. (U. S.) 86, at 100-1, 9 L. Ed. 642, at 647:

> "If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, *transit in rem judica-*

tum, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever."

See, to some effect, *Hamer* v. *New York Railways Co.* (1916), 244 U. S. 266, 61 L. Ed. 1125, 37 S. Ct. 511.

It follows necessarily that the cause of action for breach of statute, so adjudicated and "merged and gone forever," was not pending in any sense after the case was remanded on the other cause of action and when the 1941 law was passed. Only *one* cause of action continued to pend—the one for alleged fraud. Not until *after* the 1941 law was passed did appellees make claim that the statutory action was back in the case. They frankly asserted that such cause of action was "revived" by the new statute (R. 285 at 286, f. 1115) thereby conceding that such cause was dead and gone until the law was passed.

It is readily apparent that both courts considered and decided the question of revival as though the prior judgment in this very case was entitled to no legal effect whatsoever. The State Supreme Court merely concluded that the legislature did not violate the state and federal constitutions "by lifting the bar" where the statute of limitations had run, "even though it was passed subsequent to a determination by this Court that the cause was barred." (216 Minn. 269, at 277).

Disregard of the prior and final adjudication of the statutory cause of action lead inevitably to error. Certainly that judgment in appellant's favor constituted personal property and a valuable right, which thereby became vested in appellant. The very case which the State Supreme Court cited as its principal authority, *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, said unanimously that such a right cannot constitutionally be divested by subsequent legislative act.

Apart from the *Campbell* case, the rule has long been established by this Court that a litigant has a vested right

in a judgment in his favor which cannot be altered or destroyed constitutionally by an act of a state legislature. *United States* v. *Peters* (1809), 5 Cranch 115, 3 L. Ed. 53; *Mason* v. *Haile* (1827), 12 Wheat. 370, 6 L. Ed. 660; *United States* v. *Klein* (1871), 13 Wall. 128, 20 L. Ed. 519; *Memphis* v. *United States* (1877), 97 U. S. 293, 24 L. Ed. 920. All State Courts have accepted the rule without question. See collection of cases in *3 A. L. R. 450.* A vested right in an existing defense is granted the same protection, *Pritchard* v. *Norton* (1882), 106 U. S. 124, 27 L. Ed. 104, 1 S. Ct. 102. In *McCullough* v. *Virginia* (1898), 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134, it was said:

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

The judgment there entered was held to be unaffected by a subsequent repeal of the act on which the judgment was obtained.

This Court reasserted the rule and followed it in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 S. Ct. 325. In *Hodges* v. *Snyder* (1923), 261 U. S. 600, 67 L. Ed. 819, 43 S. Ct. 435, it was acknowledged to be well settled that "private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." More recently, the rule was observed by comment in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600 (footnote 25 of opinion).

Early in this term, this Court gave consideration to the question of legislative revival of a cause of action already

adjudicated. In *Allen Pope, Petitioner* v. *United States* (decided November 6, 1944), — U. S. —, 89 L. Ed. 5, 65 S. Ct. 16, a Special Act of Congress had been enacted which allowed a named, specific party to assert a new claim for construction work against the government in the Court of Claims, although such court previously had given final judgment for the government and this Court had denied certiorari. The Court of Claims held the Act unconstitutional because it required that court to set aside a final judgment in that very case, citing *United States* v. *Klein* (1871), 13 Wall. 128. This Court reversed the order of the Court of Claims, however, upon this limited ground: that the Act did not set aside any prior adjudication but created a "*new obligation*" on the part of the government, although the physical work was the same as had been litigated, and that Congress had the constitutional power (under Art. I, Sec. 8 of the Constitution and prior decisions) to impose "on the government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the government and for which Congress thought he had not been adequately compensated." The opinion is clearly restricted to this precise issue:

> "We do not consider just what application the principles of the Klein case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for determination of a pending case.
>
> . . . . . .
>
> "The special act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner."

The very situation, which this Court held was not existent in the above case, is present in the case at bar. In the above case, Congress merely acted for itself and as an agent or arm of the United States government, against whom the new liability was created. In the case at bar, the early judgment was in favor of a citizen, this appellant, and no agent of the citizen made a new promise or created a new liability. The State of Minnesota attempted to act, not for, but against this appellant, not even to create a new right but to set aside an adjudicated and settled right. It was held that the act was intended to change the law (or "rules of decision") as applied to the case at bar with which the legislature was "dissatisfied," and that the law could be so applied constitutionally so as to result in setting aside the prior final judgment and "to require a new trial of the issues" previously adjudicated. We submit, therefore, that the direct implications of this Court's language, quoted above, necessarily sustain the legal principle underlying appellant's contention here.

The State Court's decision so construed and applied the 1941 law in this case that it has resulted in the destruction of the vested right which appellant had in the prior and final judgment holding the statutory cause of action barred. It is contrary to the applicable decisions of this Court which have reaffirmed time and again a rule of constitutional law established for more than a century.

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The 1941 law, as here construed and applied, deprives appellant of his property without due process of law, because it revives a statutory cause of action which had become barred by the then applicable statute of limitations.

(Specification of Error No. 2)

The broader question of legislative power to revive a statutory cause of action, barred under a statute of limi-

tations expressly covering "a liability created by statute," has never been squarely determined by this Court. The state court decision, however, is contrary to the clearly stated principles of this Court's applicable cases.

Appellee's cause of action was one to recover the purchase price paid to appellant for stock allegedly sold in violation of the Minnesota Blue Sky Law. On the prior appeal, the State Supreme Court held the action was one founded "upon a liability created by statute," that it was barred by reason of Mason's 1927 Minn. Stat. Sec. 9191, subdiv. 2 (now Minnesota Statutes 1941, sec. 541.05 (2)), which provided:

> "9191. Various cases, six years—The following actions shall be commenced within six years:
>
> * * * * * * *
>
> "2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture. * * *."

and that that statute of limitations was not tolled by appellant's qualified departure from the state.

In the decision now on appeal before this Court, the state court failed to note or to give necessary weight to the two significant factors, i. e., that the action was one predicated entirely upon a breach of statutory duty and that the limitations statute applied to it on the first appeal was a special statute expressly restricted to such statutory actions. Instead, the opinion, quoted below in part, shows that the action was considered as though it were one to recover upon a common law liability and as though the limitations statute were a general "catch-all" statute covering any kind of common law action and applying only to the remedy:

> "In *Campbell v. Holt*, the Supreme Court held that a statute which applied merely to the remedy did not

vest such a right in the defendant that the legislature or, in that case, the constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

* * * * * * * * *

"We do not find that *Campbell v. Holt* has been reversed or reconsidered and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court.

"Statute of limitation which only bar the recovery of a *debt* or *damages for tort* are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of *such* statutes may be lifted without violating the due process clauses of either the state or federal constitutions. See also *McEldowney v. Wyatt*, 44 W. Va. 711, 45 L.R.A. 609; Orman v. Arsdell, 12 N. M. 344, 67 L.R.A. 438.

"We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to *this* case.

"The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, or the Federal Employers Liability Act, and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. G. N. Ry. Co. 92 Minn. 184, 99 N. W. 620, 104 A. S. R. 674, 2 Ann. Cas. 150; Kannellos v. G. N. Ry.

Co. 268 U. S. 633, 45 S. Ct. 612, 69 L. ed. 1126." (Italics ours.)

The State Court erred in these respects, seemingly to make it appear that the *Campbell* case was in point.

As to the nature of the action, it has been well settled by the State Supreme Court for two decades that an action of this kind, to recover the purchase price of securities sold in violation of the Blue Sky law, is a statutory cause of action, which cannot exist except for such statute. *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672; *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806; *Edson* v. *O'Connell* (1934), 190 Minn. 444, 252 N. W. 217; *Mertz* v. *Hudson Mfg. Co.* (1935), 194 Minn. 636, 261 N. W. 472.[5] That law created a liability where none existed at common law. The statutory basis of the action is controlling. Calling it an action of damages for

[5] Although the Blue Sky Statute of Minnesota has at no time since its original enactment in 1917 (Ch. 429, Laws 1917), its first revision in 1925 (Ch. 192, Laws 1925), and second revision in 1941 (Ch. 547, Laws 1941), provided any express civil remedy, purchasers of securities have been allowed to recover upon the theory that the statute was for the protection of one class against the imposition of another class. The violation of law does not merely create a rule of evidence or a circumstance to be considered in a fraud case. See *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 627-628, 238 N. W. 12, 239 N. W. 672; *Byrzinski* v. *Kinyon Investment Co.* (1934), 192 Minn. 335, 341-342, 256 N. W. 233. For statutes in other states which are similarly treated, see *Schmidt* v. *Merchants Despatch Transp. Co.* (1936), 270 N. Y. 287, 200 N. E. 824, 104 A. L. R. 450 and note (statute requiring protective devices against dust); *Amberg* v. *Kinley* (1915), 214 N. Y. 531, 108 N. E. 830 (statute requiring factories to be equipped with fire escapes); *Karpeles* v. *Heine* (1919), 227 N. Y. 74, 124 N. E. 101 (statute forbidding employment of infant under 16 years as an elevator operator); *Bank of Palmer* v. *Haley* (1929), 127 Kan. 544, 274 Pac. 265 (bulk sales statute); *City of Phoenix* v. *Drinkwater* (1935), 46 Ariz. 470, 52 Pac. (2d) 1175 (minimum wage law); *Nichols* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6th, 1912), 195 Fed. 913 (Safety Appliance Act).

tort arising from violation of the statute (as the court did on the second appeal) cannot alter its essential character.

A mere reading of the Minnesota limitations statute covering statutory actions (Mason's 1927 Minn. Stat., Sec. 9191 (2)), quoted above, shows that it is not a general limitations statute which is applied to common law actions on contract or for a tort or to any miscellaneous actions "as to which no other limitation is expressly prescribed."[6] Although the state securities law itself did not then contain a time-limitations section for actions brought for violations of it, this specific limitations provision had been found, in legal effect, to be an integral part of that law by judicial construction, as much as if the two had been enacted together. *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 296 N. W. 513; *Burzinski* v. *Kinyon Inv. Co.* (1934), 192 Minn. 335, 256 N. W. 233; see *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, and *Szroka* v. *Northwestern Bell Telephone Co.* (1927), 171 Minn. 57, 213 N. W. 557. The one statute conditioned the right to recover on the liability created by the other statute, even though they were enacted at different times and appeared under different titles in the statute book.

a. *Inapplicability of Campbell* v. *Holt:*

From what has been said, it follows, we submit, that the State Supreme Court erred in deciding that the case at bar was controlled by the rule of *Campbell* v. *Holt* (1885), 115 U. S. 620, 29 L. Ed. 483, 6 S. Ct. 209, in which, by a divided court and with a vigorous dissent, it was held that the remedy on a *common law action* "for violation of an implied

[6] Such a "catch-all" limitations provision in the Minnesota law is Mason's 1927 Minn. Stat. Sec. 9191, sub. 1, which provides a six year limitations period in actions "1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed."

contract to pay money," previously barred by a *general* limitations statute, could be constitutionally revived by suspension of that statute. The State Court likewise erred in holding that the case of *Danzer & Co.* v. *Gulf & Ship Island Ry. Co.* (1925), 268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612, was not applicable, and by failing to consider *Davis* v. *Mills* (1904) 194 U. S. 451, 48 L. Ed. 1067, 24 S. Ct. 692. We submit that the legal principles of both of these cases are applicable to the case at bar, pertaining as they do to causes of action created by statute, rather than the *Campbell* case whose rule is restricted to a common law action for debt.

Davis v. *Mills* involved an action to recover a liability from corporate directors for violation of a duty imposed by statute. It was held that such statutory cause of action was conditioned by a limitations provision which covered actions against corporation directors "to enforce a liability created by law," although (as here) such provision was enacted "at a different time" and was located in a title different from that containing the statute creating the liability. This Court (through Mr. Justice Holmes) first noted that "ordinary" limitations statutes are treated as laws of procedure affecting the remedy only and not the right. The opinion continued:

> "But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limita-

tion goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

It was observed, also, that to deny all remedy is practically to deny the right, a principle already acknowledged as to land and "even" as to chattels (for which was cited *Campbell* v. *Holt*), and that, all the more, a special limitations statute should be construed to condition a cause of action created by statute.

Moving forward from this proposition, the law of the *Danzer* case establishes the conclusion that appellee's cause of action, arising from breach of a duty imposed by statute which was conditioned by a limitations provision contained in the same statute "or another provision," could not be revived by a later legislative act without violating the due process clause. The Court said:

> "We need not re-examine the doctrine of *Campbell* v. Holt, 115 U. S. 620, 29 L. Ed. 483, 6 Sup. Ct. Rep. 209, as it is plain that case does not apply. That was an action on a contract for the recovery of money * * * The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional."

Distinguishing the common law action for debt from a cause of action created by statute, the opinion said:

> "But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability."

Appellant submits that the combined principle of the *Davis* and *Danzer* cases is directly applicable and controlling here, as against the rule in the *Campbell* case. The limitations provision, section 9191, subdivision 2, relating expressly to actions "upon a liability created by statute," conditioned the right to enforce the liability created by the registration statute, within the rule of construction of statutory causes of action laid down in the *Davis* case. The attempt to revive such a barred cause of action is a violation of the due process clause.

The case of *Campbell* v. *Holt* is inapplicable here, both on fact and upon legal principle. The rule of the *Davis* and *Danzer* cases requires a reversal.

b. *The Error of Campbell* v. *Holt, Were It Applicable:*

If, however, it is to be assumed or here found that the State Court correctly interpreted and applied the *Campbell* case, appellant submits that that decision should be re-examined and over-ruled, as a matter of sound public policy and correct law.

We may well begin with the learned and realistic dissenting opinion of Justices Bradley and Harlan in that case, wherein these principles were advocated: that the right of defense given by a statute of limitations to one party is as valuable a property right, once it has accrued, as the right of action is to the other party; that both rights should be protected by the Fourteenth Amendment from legislative aggression; that statutes of limitations serve an honorable social purpose and should be respected; and that the right of defense on this ground is a remedy of a defendant which is as much a right as the right itself, i. e., "remedies are the life of rights, and are equally protected by the Constitution."

It is significant that this Court has not since squarely considered the holding of the sixty-year old *Campbell* case.

with reference to its soundness as a matter of public policy.

Thus far, this Court has followed or approved only its *dicta* determining that in cases involving title to real estate or personal property, there could be no constitutional revival of a barred cause of action, *Sharon* v. *Tucker* (1892), 144 U. S. 533, 36 L. Ed. 532, 12 S. Ct. 720; *Toltec Ranch Co.* v. *Cook* (1903), 191 U. S. 532, 48 L. Ed. 291, 24 S. Ct. 166; *Davis* v. *Mills, supra; Northern Pac. Ry. Co.* v. *Ely* (1905), 197 U. S. 1, 49 L. Ed. 639, 25 S. Ct. 302; *Stewart* v. *Keyes* (1935), 295 U. S. 403, 79 L. Ed. 1507, 55 S. Ct. 807. In none of these cases was it indicated that the rule would be otherwise as to a barred statutory cause of action not involving title.

Such comments as this Court has made, touching upon the wisdom of the *holding* of the *Campbell* case, would indicate that the decision has not been favored but has been narrowly distinguished and restricted to its own facts. See *Davis* and *Danzer* cases, above. Furthermore, this Court both prior and subsequent to that decision has repeatedly favored a public policy which would permanently bar "ancient claims"—a policy contrary to the ultimate result of legislative revival. Thus, in *Bell* v. *Morrison*, (1828), 26 U. S. (1 Pet.) 351, at 360, 7 L. Ed. 174, at 178, the statute of limitations was described, by Mr. Justice Story, as "a wise and beneficial law" designed "to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses." That approval has been reaffirmed in numerous cases, such as *Campbell* v. *Haverhill* (1894), 155 U. S. 610 at 617, 39 L. Ed. 280, 15 S. Ct. 217, and *Guaranty Trust Co. of N. Y.* v. *United States* (1937), 304 U. S. 126, 82 L. Ed. 1224, 58 S. Ct. 785.

Again, this Court has frowned upon the broad acceptance of a rule of legislative revival of barred actions when,

in *Graham* v. *Goodcell* (1930), 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186, it sustained the validity of a special statute[7] enacted in favor of the United States to enable the collection of barred tax claims. The opinion did not cite the case of *Campbell* v. *Holt* or discuss its rule, as did several of the lower federal court decisions from which the appeal was taken.[8] Rather, it approved the special law on the narrow ground that it was "a curative statute aptly designed to remedy mistakes and defects in the administration of the government" (282 U. S. at 429). It added that a distinction could be made between that particular kind of revival statute and "a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention." We submit that the statute in the case at bar is definitely of this kind.

The same apparent reluctance of this Court to approve on broad principle the revival of barred claims is noted in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600, where a special enactment by Congress to allow an appeal from an administrative order under a federal compensation act, after the regular time for appeal had expired, was sustained as a law "to cure a fault of administration" of such law, citing the *Graham* v. *Goodcell* case, especially where the revival affected only an administrative order rather than a prior "judicial judgment."

In addition to these indications of doubt, we point out that this Court has recently noted the preferred policy for construction of limitations statutes long ago suggested by

[7] Sec. 611 of Rev. Code of 1928 (26 U. S. C. A. Sec. 2611).

[8] Such as *Wright & Taylor* v. *Lucas* (1930—C. C. A. 6th Cir.), 45 Fed. (2d) 75; *Regla Coal Co.* v. *Bowers* (1929—D. C. N. Y.), 37 Fed. (2d) 373; *Oak Worsted Mills* v. *United States* (1929—Ct. of Cl.), 36 Fed. (2d) 529.

Mr. Justice Holmes in the *Davis* case. In *Home Insurance Co.* v. *Dick* (1930), 281 U. S. 397, at 409, 74 L. Ed. 926, 50 S. Ct. 338, after citing the *Campbell*, *Davis*, and *Danzer* cases, this Court said (in footnote 7 of the opinion):

> "Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine."

The same general question was also mentioned, but not decided in *Mid State Horticultural Co.* v. *Pennsylvania Rd. Co.* (1943), 320 U. S. 356, 88 L. Ed. 83, 64 S. Ct. 128, wherein the *Davis* and *Danzer* cases again were cited.

The federal courts have not accepted the majority rule of the *Campbell* case in any determination of rights as between two ordinary litigants. Several of them[9] have applied the *Campbell* case to uphold the validity of the tax claim revival statute discussed in *Graham* v. *Goodcell*, *supra*. But in so far as the acceptance of the *Campbell* case for this purpose is concerned, they are in effect overruled by this Court's decision in the *Graham* case, wherein neither the *Campbell* case nor its holding was mentioned and revival was allowed only upon the narrow ground above discussed.

In the light of the judicial history of the *Campbell* case in both this Court and the federal courts, it is not surprising to find that the vast majority of the highest state courts have expressly followed the principle and reasoning of its dissenting opinion, as a matter of public policy,

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[9] Representative of such federal cases are the following: *Pittsburgh Can Co.* v. *United States* (1940—C. C. A. 3rd Cir.), 113 Fed. (2d) 821; *City of Sour Lake* v. *Branch* (1925—C. C. A. 5th Cir.), 6th Fed. (2d) 355; *Huntley* v. *Gile* (1923—C. C. A. 9th Cir.), 32 Fed. (2d) 857; *United Thacker Coal Co.* v. *Commissioner* (1931—C. C. A. 1st Cir.), 46 Fed. (2d) 231. These and other cases are so grouped in an annotation in 133 A. L. R. 384 at 388.

and that most of the legal writers on the subject have disapproved of the doctrine of legislative revival of barred claims.

At least eleven State Supreme Courts have so held;[10] in only three states has the majority view of the *Campbell* decision been applied to cases not involving special circumstances.[11] Furthermore, none of those three cases involved a statutory cause of action. See annotations in *36 A. L. R. 1316*, and *133 A. L. R. 384*; and *34 Am. Jur. sec. 35, p. 39*. The writers who have considered *Campbell* v. *Holt* have questioned the theoretical distinction made in that case and have favored the dissenting opinion. *Lewis' Sutherland, Statutory Construction* (2nd ed.) Vol. 2, sec. 708, p. 1288; *Wood, Limitations* (4th ed.), Vol. 1, sec. 11, pp. 47-49; *24 Columbia Law Review*, 803 (1924); *10 Cornell, L. Q.* 212 (1924); *2 Geo. Wash. L. Rev.* 100 (1933). See, also *Rottschaefer, Constitutional Law* (1939), sec. 252, p. 548-9.

In a few states, legislative revival of barred rights have been sustained under the peculiar circumstances of the specific cases, the courts in each instance cautiously pointing out that they did not thereby approve a broad or general application of the holding of the *Campbell* case. Thus in *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238

[10] *Wasson* v. *State* (1933), 187 Ark. 537, 60 S. W. (2) 1020; *Bussey* v. *Bishop* (1929), 169 Ga. 251, 150 S. E. 78; *Board of Education* v. *Blodgett* (1895), 155 Ill. 441, 40 N. E. 1025; *Siefkin* v. *Siefkin* (1939), 150 Kan. 396, 92 Pac. (2) 1005; *Jackson* v. *Evans* (1940), 284 Ky. 748, 145 S. W. (2) 1061; *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142; *Wilkes County* v. *Forester* (1933), 204 N. C. 163, 167 S. E. 691; *Raymer* v. *Comley-Lumber Co.* (1934), 169 Okla. 576, 38 Pac. (2) 8; *Cathey* v. *Weaver* (1922), 111 Tex. 515, 242 S. W. 447; *Re Sloan* (1938), 95 Utah 408, 79 Pac. (2) 999; *Eingartner* v. *Illinois Steel Co.* (1899), 103 Wis. 373, 79 N. W. 433; See, also, *Dunbar* v. *Boston & P. R. Co.* (1902), 181 Mass. 383, 63 N. E. 916; and *Hopkins* v. *Lincoln Trust Co.* (1922), 135 N. Y. 213, 135 N. E. 267.

[11] *Orman* v. *Van Arsdell* (1904), 12 N. Mex. 344, 78 Pac. 48; *Gilbert* v. *Selleck* (1919), 93 Conn. 412, 106 Atl. 439; and *Herr* v. *Schwager* (1927), 145 Wash. 101, 258 Pac. 1039.

N. Y. 271, 144 N. E. 579, a special statute was upheld which allowed a widow to sue on a claim which had become barred during the time she relied upon another statute subsequently declared invalid. In *Danforth* v. *Groton Water Co.* (1901), 178 Mass. 472, 59 N. E. 1033; *Dunbar* v. *Boston & P. R. Corp.* (1902), 181 Mass. 383, 63 N. E. 916, and *Mulligan* v. *Hilton* (1940), 305 Mass. 5, 24 N. E. (2d) 676, the Massachusetts court reluctantly approved statutes intended to give relief from technical procedural mistakes and expressly refused to accept the *Campbell* case as a general rule. In *Jackson Hill Coal Co.* v. *Commissioners of Sullivan City* (1914), 181 Ind. 335, 104 N. E. 497, revival was allowed only as to claims against the state or its subdivisions.[12] Mr. Justice Holmes, in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 S. Ct. 325, aptly referred to cases of the kind of *Danforth* and *Dunbar* as being exceptions, arrived at by "various circumlocutions" in order to overcome "some slight technical defect" or to attain "some strongly prevailing view of justice."

In all events, the case at bar is not such a case. The undisputed record shows that appellees' testate had six full years, the well understood statutory period in Min-

[12] Other special situation cases are: *Evans Products Co.* v. *Fry* (1935), 307 Mich. 506, 12 N. W. (2) 448, approved the *Campbell* case only "as applied to our construction of Act 170 (an escheat law) under the circumstances of this case." The broader principles against revival, declared by the earlier Michigan case of *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142 (footnote 10, above), remains unchanged.

Berkin v. *Healy* (1916), 52 Mont. 398, 158 Pac. 1020, involved only a suit to cancel an outlawed mortgage. *Bates* v. *Cullum* (1896), 177 Pa. 625, 35 Atl. 861, held a newly enacted tolling statute applicable to a previously accrued cause of action on contract against a non-resident. In both cases, brief comment on the *Campbell* case was dicta and related only to revival of a barred *debt*.

McEldowney v. *Wyatt* (1898), 44 W. Va. 711, 30 S. E. 239, approved the *Campbell* case only to allow recovery of a barred claim for taxes, the opinion pointing out that "taxes are not a contract or a debt."

nesota, within which to commence an action for breach of the registration law. During that entire period, appellant was amenable to suit either directly or through its duly appointed agent for service of process as provided by statute, after it had withdrawn from active business in Minnesota in 1931, *Pomeroy* v. *National City Company* (1941), 209 Minn. 155, 296 N. W. 513; *Donaldson* v. *Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518. She slept on her rights not only for that period but for more than two years thereafter. There is no evidence that she was confused by any change in the prevailing law, or that there was any oversight in technical procedural matters, or that the original six-year period was inadequate, or that any other special hardship or injustice existed. The "special situation" cases do not apply here, whatever their worth as legal precedent.

The 1941 law, as here construed, revived for one year appellee's cause of action which had been barred by the then applicable limitations statute since August 10, 1935. In other words, this cause of action had been dead for six years.[13] If such a law is now to be sustained, there would be precedent which would encourage any litigant, having once held a cause of action founded either on a common law duty or upon a statute, but which has long since become barred by all existing limitations provisions, to seek and obtain the passage of a law reviving such cause of action, no matter how many years may have elapsed since the transaction. Such a precedent would be dangerous in its economic and social consequences:

> —as to the parties, there would always be the threat of revival at any time long after proof has been lost

[13] If the law is held to be general legislation (rather than special legislation as next contended by appellant), it revived all causes of action for violation of the state Blue Sky Law occurring since it was first enacted in 1917—a period of nearly twenty-five years.

and witnesses have forgotten or have died or disappeared, a danger recognized by this Court for more than a century.

—as to the courts, there would be no end to litigation and the public policy sustaining the limitations provisions, long acknowledged by this Court, to be "a wise and beneficial law," would be defeated.

—as to the legislature, it would invite special interests and lobbies of all kinds, to bring special inducements and pressures upon the legislature and thus subject the latter to unwholesome influences.

—as to the public, there would be unnecessary uncertainty in the law and in business relationships dependent upon it.

Nor can it be argued convincingly that any public policy would be harmed by judicial disapproval of a broad principle allowing legislative revival of any and all barred causes of action, statutory or common law. The statutory exception imposing liability upon a new promise in writing or upon part payment of a barred *contractual* claim (see, for example, Minnesota Statutes, 1941, Section 514.17) would continue on the well accepted theory of a *new* liability rather than a revival of the barred obligation. *Willoughby* v. *Irish* (1886), 35 Minn. 63, 27 N. W. 379. An exception allowing revival of actions to collect barred taxes or to correct administrative mistakes would continue on the narrow rule of *Graham* v. *Goodcell*, supra. The so-called special hardship and injustice cases would necessarily stand on their own peculiar facts and circumstances as to which, if necessary, the *Campbell* case might well be limited. None of these exceptions need be altered to adopt appellant's contention in this case.

We submit that public policy would be better served if this Court were to overrule the holding of *Campbell* v. *Holt* and adopt the principle of its dissenting opinion—that the right to set up the bar of a statute of limitations as a de-

fense to any cause of action (statutory or common law) after the statutory period has run, is a vested right which cannot be taken away constitutionally by subsequent legislation. Such a decision would but follow the long settled policy sustaining all limitations provisions; it would be supported by the more recent expressions of this Court in the *Davis* and *Danzer* cases; and it would remove the legal confusion incident to the unsound and theoretical distinction between statutes of limitations which are said to affect the right and those which are said to affect the remedy. It is difficult, if not impossible, to imagine a case where, in the absence (as here) of special hardship circumstances, such a rule would result in injustice.

The 1941 law, as here construed and applied, deprives appellant of its property without due process of law. The lower court's decision is contrary to the applicable decisions of this Court and to sound public policy. Its only purported basis, the holding of *Campbell* v. *Holt*, should be cast aside if it is applicable to this case at all.

3

The 1941 law, as here construed and applied, denies appellant equal protection of law because it was enacted specifically to reverse the rule of law previously settled in appellant's favor on the first appeal, so as to allow purchasers of appellant's stock to maintain already barred actions against it.

(Specification of Error No. 3)

The State Supreme Court expressly found as follows (216 Minn. 269, at 273-4; see R. 405, ff. 1821-1822):

> "The legislature acted promptly after our first opinion was filed. The inference is plain that it was dissatisfied with the law as laid down in that opinion and regarded

it as unjust to the numerous plaintiffs who had bought this stock and had cases pending or had causes of action which would not be outlawed if the time subsequent to withdrawal from the state should be regarded as tolling the statute, as had been held in the federal court City Co. of New York v. Stern (8 Cir.) 110 F. (2d) 661.

"That it had all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered. It was well known that a multitude of sales of this and other unregistered stock had been made in this state shortly before the 1929 crash. The evidence in this case shows about 500 sales of Chase units in Minnesota by this defendant in 1929. The legislature must have known that the great bulk of the violations of the statute had occurred prior to the crash and that few, if any, had occurred afterwards. As heretofore stated, defendant effected its withdrawal from the state in 1931. In the National City case (Pomeroy v. National City Co. 209 Minn. 155 N. W. 513), the withdrawal was effected in 1934. If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any cases."

This Court is bound by this construction and application of the statute, "and the case must be considered as though the statute had, in specific terms," so provided, and "as though such meaning had been specifically expressed" therein." *Cudahy Packing Co.* v. *Parramore* (1923), 263 U. S. 418, 68 L. Ed. 366, 44 S. Ct. 153; *Knights of Pythias* v. *Meyer* (1924), 265 U. S. 30, 68 L. Ed. 885, 44 S. Ct. 432; *Hartford Accident & Indemnity Co.* v. *Nelson Mfg. Co.* (1934), 291 U. S. 352, 78 L. Ed. 840, 54 S. Ct. 392. The generality of the statutory language itself is no longer determinative after the highest state court has placed upon it a narrow and specific interpretation. *Leffingwell* v. *Warren* (1862), 67 U. S. (2 Black.) 599, 603, 17 L. Ed. 261, 262.

The sole question here is, not whether the statute may have been given another construction and application, but whether the statute, as here construed and applied, is valid. *Concordia Fire Ins. Co.* v. *Illinois* (1924), 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830; *Prince* v. *Commonwealth* (1944), 321 U. S. 158, 88 L. Ed. 403, 64 S. Ct. 438.

As so construed and applied, the proviso of the law became a special statute which was designed and intended to reopen for a period of one year after July 1, 1941, all claims against appellant and National City Company, only, and as to "this stock," *only*, and to leave the bar of the limitations statute unchanged as to all other corporations and securities, whatsoever their kind or nature. On the Supreme Court's construction, the legislature did all this because it wanted the purchasers of "this stock" to recover from these two particular corporations; it did not like the prior opinion of the state court which denied such recovery; it was determined to change "the law" specifically as to these corporations and in favor of such stockholders. The State Supreme Court said in effect that the clause must be read as though it had provided expressly:

> "* * * but as to the 'combined units' sold in this state prior to the crash in 1929 by Chase Securities Corporation and National City Company, and notwithstanding the decisions of the Supreme Court in the *Pomeroy* and *Donaldson* cases with which the legislature is dissatisfied, an action may be brought by the plaintiffs in said cases and by other purchasers of such stock within one year following the effective date of this section and all actions heretofore adjudicated upon such stock against such purchasers are hereby automatically revived without further act of such purchasers."

Such construction was determinative and vital to the decision, without which the Court could not have concluded

that the legislature should not have used the word "provided," as it did in this statute."[14] It was necessary not to confirm or clarify, but rather to *remake* the purportedly "clear" statutory language in order to reach the result which the court was bent upon reaching.

It is a settled rule of this Court that the equal protection clause of the Fourteenth Amendment requires that the classification of persons or corporations for legislative purposes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287; *Royster Guano Co.* v. *Virginia* (1920), 253 U. S. 412, 64 L. Ed. 989, 40 S. Ct. 560; *Louisville Gas and Electric Co.* v. *Coleman* (1928), 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423.

The construction and application of the 1941 law given by the State Supreme Court violates these fundamental standards. It does not even purport to apply to a classification of corporations of which appellant might be considered a part. It rests upon no fair or reasonable basis whereby appellant and National City Company might be distinguished from hundreds of other securities houses throughout the country who had sold securities in Minnesota during the period "more than five years" before July 1, 1941, the effective date of the law. There is no conceivably logical basis for legislation enacted for the specific purpose of restoring to purchasers of two stocks in Minnesota rights of action which were not restored to purchasers

[14] After the extensive review of these purported "circumstances under which the law was enacted" the Minnesota court concluded, "we look to the intent expressed even if it is in a proviso when it should have been expressed without the use of the word, 'provided'" (R. 406, f. 1822).

of thousands of other stocks in this state during the same period "more than five years" prior to July 1, 1941.

Nor can the law be sustained as a proper classification of corporations foreign to the state of Minnesota, since that distinction has no reasonable basis with relation to the object of the legislation and there is no reasonable presumption that equality would result. *Air-Way Electric Appliance Corp.* v. *Day* (1924), 266 U. S. 71, 69 L. Ed. 169, 45 S. Ct. 12; *Power Mfg. Co.* v. *Saunders* (1926), 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678. Appellant was as much present and subject to suit in Minnesota at all times as a domestic corporation, inasmuch as it had complied with the statute requiring appointment of an agent for service of process when it withdrew from that state in 1931. *Pomeroy* v. *National City Co.* (1941), 209 Minn. 155, 159, 296 N. W. 513, 515; *Donaldson* v. *Chase Securities Corporation* (1941), 209 Minn. 165, 296 N. W. 518. The discrimination is entirely arbitrary, no matter what basis is assumed. *Smith* v. *Cahoon* (1931), 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582; *Borden's Farm Products Co.* v. *Baldwin* (1934), 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187.

The law comes within the well stated prohibition, announced by this Court in *Hartford Steam Boiler Inspection & Insur. Co.* v. *Harrison* (1937), 301 U. S. 459, 81 L. Ed. 1223, 57 S. Ct. 838:

> "Despite the broad range of the States discretion, it has a limit (under the equal protection clause) which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 79 L. Ed. 281, 288, 55 S. Ct. 187. They cannot stand as reasonable if they offend the plain standards of common sense."

It is subject to the same condemnation levelled by this Court, in *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*

(1899), 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565, at a state law granting railway rate privileges to a certain class of persons:

> "It is a pure, bald, and unmixed power of discrimination in favor of a few persons. * * * There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason."

Exhaustive search of the decisions of this Court has not revealed a single case where a state law, being reviewed under this objection, has been given such an arbitrary, discriminatory and unreasonable construction. The foregoing decisions of this Court, stating the scope of equal protection, establish the invalidity of a law so extreme as this one has been construed to be.

4

The judgment of the State Supreme Court violates the due process clause of the Fourteenth Amendment guaranteeing a fair trial, because it is predicated upon a finding of legislative intent made by the court without allowing appellant a trial of that issue or an opportunity to know the factual basis for such finding.

(Specification of Error No. 4)

In construing the proviso clause of the 1941 law, The Minnesota Supreme Court found that the legislature was dissatisfied with the law settled by the prior appeal, that it believed that law "unjust to numerous plaintiffs," and that it had this and similar cases in mind and it intended to revive barred claims against appellant and National City Company and particularly those adjudicated by the 1941 decisions (quoted in first paragraph of Point 3, above).

There is no proof whatsoever in the record to support such a finding of legislative purpose and intent. The only reference to evidence was that appellant had made about 500 sales of Chase units in Minnesota prior to 1929—a fact not even suggestive of the many assumptions made concerning legislative mind. Nor can such finding be read from the plain words of the proviso when it is properly considered with the obvious legislative purpose of the entire section—*to limit* rather than to extend the time for bringing actions for violations of the Blue Sky law.

The court's opinion in effect admits the correctness of the above statement because, in order to avoid the customary purpose of "proviso" clauses (to limit rather than to extend) which it conceded, it found it necessary to resort to a lengthy discussion of numerous and detailed factual assumptions and alleged circumstances (totalling fully 1½ pages of the 9 pages of the opinion as printed in the state reports), plainly drawn from sources outside the record evidence and outside the statutory words themselves. Having done so, it concluded that the words of the proviso (apart from the section as a whole) "*and* ~~and~~ circumstances under which the law was enacted" required the finding of legislative intention "even if it is in a proviso when it should have been expressed without the use of the word 'provided' " (R. 406, f. 1822), and even though such finding resulted in a construction of the proviso contrary to the general rule of statutory constuction provided by statute at the same legislative session; namely, that "provisos should be construed to limit rather than to extend the operation of clauses to which they refer" (Minn. Stat. 1941, Sec. 645.19). That finding was not one to confirm the words of the clause; rather, it was the principal reason given for *remaking* the proviso language to read as though the word "provided" did not exist therein.

The question of legislative intent in this case thereby ceased to be a pure question of law based alone on the words of the statute. The State Supreme Court for the first time made the question one of fact. As such, the fact of legislative intent became an issue concerning which evidence is as admissible as upon any other question of fact. See *Henry Wolf Bikel, "Questions of Fact Affecting Constitutionality,"* 38 Harv. L. Rev. 6; 1 *Wigmore on Evidence* (3d ed.) Sec. 4 (1) pp. 145-46; 9 *Wigmore on Evidence* (3d ed.) Sec. 2555, pp. 521-22; *Nashville, Chattanooga & St. Louis Ry.* v. *Walters* (1934), 294 U. S. 405, 79 L. Ed. 949, 55 S. Ct. 486. Where (as here) the fact question is one of decisive significance, the parties should have the right (which a court should recognize and welcome) to submit all available proof on the issue. Unless such right is given and protected, a fair trial is denied.

When the question was first presented as one of fact by the Supreme Court's opinion, appellant on its Petition for Rehearing challenged the finding as being without any support in the record evidence and contrary to all the available factual proof of legislative intent. It therein made an offer of proof (See Petition for Rehearing, Point II, R. 416-438), consisting of the following:

> The detailed affidavit of the official sponsor of the 1941 law, the Commissioner of Securities, showing that the preliminary draft of the bill containing the identical proviso here in question, except that the period was 2 years in place of 5 years, was submitted to him three weeks prior to the decisions in this and the *Pomeroy* cases on the first appeal (R. 425, 427); and that after those decisions were handed down on January 10, 1941, he did not recall that he, or anyone in his department, or any member of the legislature expressed the desire to lift the bar as to any outlawed suits or the desire or intention to pass a law to reopen barred claims or to

change the law as then decided by the Supreme Court (R. 426; 427).

The detailed affidavits of two members of the judiciary committee of the House of Representatives where the only recorded discussion of the bill occurred, showing that no mention was made of the *Pomeroy* and *Donaldson* cases nor was any intention expressed by anyone to revive barred claims in those cases or Blue Sky cases generally (R. 431-432).

The official Journals of the Minnesota House of Representatives and Senate for the 1941 legislative session and the committee reports, showing, among other things, that in the legislative history of the law there was no affirmative evidence of an intention to revive the barred causes of action in this or the *Pomeroy* case or to revive barred causes of action in Blue Sky cases generally (R. 428-431).

Such offer was accompanied by a request for remand of the case to the trial court for trial of that issue, or a reference for taking of evidence thereon, the appellant contending that otherwise it would be denied a fair trial on the issue, as guaranteed by the due process clause (R. 418, f. 1848—R. 420, f. 1852). Both the offer of proof and the request for remand were denied summarily by the State Supreme Court without opinion, when the entire petition was denied (R. 474, f. 1936).

There are two substantial reasons why, prior to this time, appellant had offered no factual proof of legislative intent, both arising out of the unusual manner in which the 1941 law came into the case and its treatment by the trial court and appellee's counsel: (a) the failure of appellee to sustain her burden of proof of evidence on the issue of legislative intent, as a result of which there was nothing factual in the case on the issue for appellant to controvert by proof; and (b) the denial by the trial court of appellant's motions,

made after passage of the 1941 law; for a new trial on all issues. The procedural history of the case shows appellant never waived its right to submit the proof which it offered at its first opportunity.

On the first reason, the record shows that the main trial of the action occurred in May, 1939, almost two years prior to the passage of the 1941 law. On her motion for amended findings of fact or a new trial made after the law was enacted, appellee did not ask for leave to offer evidence on the intent of the legislature in enacting that law (R. 285-286), but requested the proposed finding as to the applicability of the law (R. 285) as a pure question of law to be determined by the words of the law itself. Neither did appellee contend in the trial court or upon appeal to the State Supreme Court for a finding of intent based upon matters apart from the statutory language, on the theory of judicial notice or otherwise. All the while and as a matter of basic trial procedure, she had the burden of proving the affirmative of what the Supreme Court later found by resort to outside facts. And that burden was especially upon her because, in effect, she contended for a result which would run counter (as the Supreme Court decision frankly admits) to the presumption existing in appellant's favor by virtue of the provision of the general construction statute, saying that "provisos should be construed to limit rather than to extend the operation of clauses to which they refer" (Minn. Stat. 1941, Sec. 645.19).[15] Appellee having failed to

[15] The situation is analogous to that where the meaning of words of a contract is called in question. In such situation, the party claiming that the words used differ from the ordinary and accepted meaning has the burden of proving such claim. *DeWitt* v. *Berry* (1890), 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896, 900; *Tampa Shipbuilding & E. Co.* v. *General Constr. Co.* (C. C. A. 5th 1930), 48 F. (2d) 309, 85 A. L. R. 1178, 1184; *Sunseri* v. *Garcia & M. Co.* (1929), 298 Pa. 249, 148 Atl. 81, 67 A. L. R. 1428, 1430.

submit the factual proof in the trial court which the Supreme Court later deemed material and decisive, there was nothing factual on the issue for appellant to controvert at any time during trial of the case.

On the second reason, appellant, notwithstanding the lack of procedural burden on its part to submit proof on the issue to the trial court, took all available steps to call the absence of evidence on the question to the trial court's attention. Thus, the trial court in June, 1942, made a brief, vague, and indefinite finding that "insofar as" the provisions of the 1941 law "are applicable to plaintiff's cause of action" the time for assertion thereof was extended (Par. XXXII (third paragraph), R. 313-314, f. 1157) but failed to make any specific finding of legislative intent as to the law. Promptly, appellant made its motion for amended findings or a new trial on the ground, among others, that the trial court's application of the 1941 law was not supported by the evidence in the record (Par. No. 13 of Motion, R. 338). This motion was denied in November, 1942 (R. 351) and the ruling was assigned as error on the appeal (Par. No. 31, R. 384-386, ff. 1794-1796). There was nothing more which appellant could have done. It fulfilled every procedural requirement, technically and as a practical matter. Appellant's offer of proof, made promptly after the State Supreme Court's reliance upon factual aspects of the issue, was timely and seasonably made under all the circumstances of this case.

Furthermore, inasmuch as such basis of decision for the above reasons could not have been reasonably anticipated by appellant prior to the Supreme Court's opinion, it is entitled to the protection, also, of a rule of this Court which has allowed a review of federal questions raised for the first time on a state court petition for rehearing, where it could "not reasonably be held that the company was bound to anticipate such a construction." *Missouri ex*

rel. Missouri Ins. Co. v. *Gehner* (1930), 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326; and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

The offer of evidence made by appellant at its first real opportunity was proper. In numerous cases, this Court has fully examined and relied upon statements from individual members of Congress (both proponents and opponents of bills), deliberations and reports of legislative committees, and debates, to determine the legislative intent and purpose of an act. See, for example, *Helvering* v. *Griffiths* (1943), 318 U. S. 371, 87 L. Ed. 843, 63 S. Ct. 636; *United States* v. *Wrightwood Dairy Co.* (1942), 315 U. S. 110, 86 L. Ed. 726, 62 S. Ct. 523; *United States* v. *Dickerson* (1940), 310 U. S. 554, 84 L. Ed. 1356, 60 S. Ct. 1034; *United States* v. *Dotterweich* (1943), 320 U. S. 277, 88 L. Ed. 74, 64 S. Ct. 134, and an extensive collection of decisions of this Court and State Courts to the same effect in 70 A. L. R. 5. The same rule prevailed in Minnesota at the time this case was before the State Supreme Court, *Barlau* v. *Minneapolis-Moline Power Co.* (1943), 214 Minn. 564, 9 N. W. (2) 6.

The matters of the kind here offered by appellant as proof were the most competent proof available on the question. If such kind of proof is inadmissible, then no proof is admissible. Legislative intent would indeed be a fiction, subject entirely to the whim and caprice of the Court and incapable of any factual contradiction—no matter how erroneous (as here) the judicial assumption might be and how compelling the true facts to the contrary would appear. This is not and should not be the law of this Court.

The only seeming basis for the State Court's finding on the issue is that the matters found were the proper subject of "judicial notice." Appellant submits that such matters

were not of that character. But even if they were, it is the well settled law of this Court that due process guarantees to the opponent the right to a trial, wherein he may be advised of the facts of which the Court is about to take judicial notice and wherein he may show facts and circumstances contradictory to the matters to be judicially noticed. This rule is squarely accepted in *Ohio Bell Telephone Co.* v. *Public Utilities Commission* (1937), 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724. The Ohio Public Utilities Commission and the State Supreme Court in a rate case refused to permit the defendant telephone company to be heard and to submit evidence contradictory to certain price trends which had been judicially noticed, on the ground that such matters could not be controverted. On appeal, this Court held that the defendant company had been denied a fair hearing, in violation of the due process clause. The opinion said in part:

> "Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.
>
> "An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice.
>
> . . . . . .
>
> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, §2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'
>
> . . . . . .

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.

. . . . . .

"What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"

The rule of this case had been recognized previously in 5 *Wigmore on Evidence* (2d Ed.), Sec. 2567, p. 570. It has been reaffirmed in 9 *Wigmore on Evidence* (3rd Ed.) Sec. 2567, p. 535.

Other expressions of this Court are to the same effect. In *Borden's Farm Products Co.* v. *Baldwin* (1934), 293 U. S. 194, 79 L. Ed. 281, 55 S. Ct. 187, this Court observed that the "sphere of judicial notice" has definite limitations and that the constitutionality of legislative action should not be determined without the taking and considering of all available evidence on the question. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, and *Nashville, Chattanooga & St. Louis Ry.* v. *Walters, supra,* it was held that the due process clause requires a State Court (a) to afford a party the opportunity to present its case and to be heard in its support, and (b) to consider all of such evidence before deciding the validity of a state law.

Here, both constitutional rights of appellant: (a) the right to know the particular facts judicially noticed, and (b) the right to dispute such purported facts by evidence, have been violated. The State Supreme Court never stated

the source of such matters seemingly noticed. Appellant does not yet know the basis for the assumptions as to legislative mind and intent. Nor has it had the opportunity to submit the readily available and competent proof which we consider to be strongly contrary to those assumptions.

The State Court's abrupt disposition of the issue without trial is wholly without legal precedent and is devoid of the most elementary principles of justice. A substantial right guaranteed appellant by the due process clause has been violated.

Conclusions

Appellant respectfully submits that the judgment appealed from should be reversed for any one or all of these reasons:

1. It construes and applies the 1941 law so as to abrogate a prior final judgment in appellant's favor in this same case, and thereby deprives appellant of its property without due process of law.

2. It construes and applies the 1941 law so as to revive a cause of action for breach of a statute, barred by a limitations statute which limited the right of recovery, and thereby deprives appellant of its property without due process of law.

3. It construes and applies the 1941 law against appellant so as to make it an unreasonable and arbitrary law, and thereby denies appellant the equal protection of the laws.

4. It is predicated upon a finding of legislative intent concerning the 1941 law as to which appellant had no opportunity for trial or to know the factual basis for such finding, thereby depriving appellant of a fair trial and of due process of law.

In so reversing, this Court will protect not only appellant but future litigants against unconstitutional legislative action which would abrogate a final judgment of the state in favor of a litigant, or which would revive "ancient claims" (statutory or common law) which had become barred years before, or which would be applied only to an arbitrary and special class of persons. And appellant and all litigants will thereby be protected, also, against judicial action which would deny fair trial upon matters considered to be within the "sphere of judicial notice."

Dated: December 5, 1944.

Respectfully submitted,

F. H. Stinchfield,
S. S. Jennings, Jr.,
Counsel for Appellant.

John M. Palmer,
Floyd E. Nelson,
Of Counsel.

(5459)

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 110.

CHASE SECURITIES CORPORATION, Now Known as Amerex Holding Corporation,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON and FRANK A. DONALDSON, JR., Executors of The Estate of Ruth Chase Donaldson, Deceased, Substituted as Respondents,

Appellees.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

HENRY ROOT STERN,
FREDERICK H. STINCHFIELD,
SAMUEL S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1944.

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS,

Appellees.

No. 110.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

Constitutional Issues Seasonably Raised.

Appellees urge that the case is not reviewable because no federal questions were seasonably raised. Such contentions are supported by no substantial argument or authority not considered by this Court on the jurisdictional briefs of the parties, upon which this Court entered its order noting probable jurisdiction. Since, however, their consideration requires review of procedural history, also involved on the merits, we shall postpone our argument on jurisdiction until after discussion of the merits. (*Infra*, pp. 30-36.)

APPELLANT'S POINT I.

Denial of Due Process by Statutory Abrogation of Final Judgment.

(Appellant's Brief, pp. 13-20; Appellees' Brief, pp. 33-52.)

Upon analysis, appellees' extended and somewhat labored answer to appellant's Point I reduces itself to this:

> (1) there was no separate "cause of action upon a liability created by statute" which could be the subject of a "final judgment"; and
>
> (2) there was no final judgment, such as would be entitled to the protection of the due process clause.

These assertions are presented with more emphasis on labels and terminology than on substance and the record facts.

Separate Right of Action on Statutory Liability.

We submit that all of the determinations of the trial court and of the State Supreme Court, as well as the basic theory of all proceedings taken therein by both parties, establish beyond reasonable argument that the claim based on breach of statute was separate and distinct from that based on fraud. All courts declared and held, in legal effect, that such claim constituted a separate cause of action. Even as late as the second appeal in the State Supreme Court appellees themselves affirmatively so argued.[1]

---

[1] Appellees, summarizing their conclusions in their Re-Brief, said (p. 46):

> "(1) Her statutory or Blue Sky *cause of action* based on non-registration of stock and non-licensing of agent.

Their recent change in terminology from "cause of action" to "issue" or "ground" should therefore be examined critically. Obviously it is the result of their difficulty in finding an argumentative escape from the determinative effect of the decision on the first appeal.

However, that phase of the case which involved statutory violation alone, whether called "issue", "ground" or "claim", none the less involved a cause of action entirely distinct from that based on fraud.

No amount of terminological refinement can obscure the legal effect of the following essential record facts:

The complaint, without separation—either numerical or formal—into counts, alleged:

(1) Breach of fiduciary relations between Broker and Customer;[2]

(2) Blue Sky Law violation;

(3) Fraud based on misrepresentation;

(4) Implied fraud resulting from sale alone;

(5) Fraud by concealment of the above.

---

though barred under decision on former appeal, has been constitutionally revived by Laws 1941, c. 547, §18.

"(2) Her *cause of action* based on actual fraud, perpetrated through implied representations as to (a) registration, (b) licensing of agent, and (c) free and uncontrolled market, was established by competent evidence. *This cause of action* had not [been] outlawed in 1941 and was recognized by the 1941 statute." (Italics supplied.)

[2] Since the Broker-Customer relationship was inconsistent with a Seller-Buyer relationship, the appellees, forced by appellant's pretrial motion, elected to stand on the latter (R. 33-34). This is the so-called "stipulation" relied upon by appellees to demonstrate that there was only one cause of action. (Appellees' Brief, p. 13). Appellant did not challenge the joinder of the consistent causes of action for violation of statute and for fraud which joinder Minnesota Code provisions permitted. Appellees' counsel and the trial court, even at that time, noted the presence of the statutory and fraud liabilities (R. 26-27, ff. 85-86; R. 34, f. 96). See *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, 239 N. W. 672.

Out of this declarational hodge-podge, the trial judge spelled a cause of action for violation of the Blue Sky Law, made findings appropriate to that issue alone, and held thereon for appellees[3] (R. 258-9). Judgment was entered (R. 274). There were no findings on the fraud issues (R. 258, par. 26; 266-8). On the contrary the trial judge expressly refused to make such findings and denied appellees' motion to that end[4] (R. 273-4), having previously expressly stated in his memorandum (R. 267) that his decision was based only on the "independent ground" of statutory liability, to which appellees' counsel had *agreed*. Appellees did not appeal.

May appellees now reasonably contend that such judgment was not supported by an adequate cause of action, and that the same did not rest *solely* upon a determination of the "issue" or "matter" or "independent ground" of violation of the Blue Sky Law?

The trial judge did not, as appellees claim (Brief, p. 15), reserve fraud issues for future determination. The findings, conclusions and order for judgment were complete and final and judgment was entered without reservations. Barring appeal, the case was ended.

---

[3] It is settled Minnesota law that whether a complaint states more than one cause of action is a question of law, to be determined not by the form of the pleading or by the numbering or labelling of its paragraphs, but by the facts alleged. *Dewing* v. *Dewing* (1910), 112 Minn. 316, 127 N. W. 1051; and *Bacich* v. *Northland Transportation Co.* (1928), 173 Minn. 538, 217 N. W. 930.

[4] The court said (R. 274):

> "The court having heard the arguments of counsel and being of the opinion that the present findings are adequate to support the order for judgment, for the reason that the court has sustained recovery for the plaintiff on an independent ground, namely, violation of the Blue Sky Law, and tolling of the statute of limitations, and that therefore it is unnecessary at this time to make findings on the issues presented in said notice of motion."

The appeal from such judgment was upon all the issues and findings supporting it: whether there was a violation of the statute, and, if so, whether the action therefor was barred by expiration of the six-year limitations, which in turn depended upon the tolling question. It was as complete an appeal on the merits of that statutory claim as if it had been alleged in, and tried as, a separate case. Upholding the bar, the Supreme Court said in the companion *Pomeroy* case (upon which its short opinion in this case was expressly hinged) [R. 362]:

> "It is enough of the facts that plaintiff must be considered to have sued 'upon a liability created by statute' arising from defendant's business in Minnesota. Under Mason Minn. St. 1927, §9191, the action is barred, not having been commenced within six years from the time the cause of action accrued, * * *, unless saved by the tolling provisions * * *" (R. 354).

It is thus beyond fair argument that the Court decided that plaintiff had sued upon a "cause of action" based upon a liability created by statute and that the action was barred, since limitations were not tolled.[5]

Appellees recognized the distinction between the issues of Blue Sky liability and fraud in their motions, upon remand after such appeal, for findings as to "issues of fraud" (R. 277-84), and, after the passage of the 1941 statute, for an additional finding that "Plaintiff's cause of action, based upon illegal sale" of the security was "revived by that law (R. 285-286).

[5] Appellees' repeated insistence (Appellees' Brief, pp. 15, 36, 37) that the State Court decided only that limitations were tolled, and not that the cause of action was barred, is unworthy of serious consideration. As noted above, the Court said specifically that "the action is barred * * * unless saved by the tolling provisions * * *" and held that it was not saved. Otherwise, the tolling question would have been moot.

The same distinction was preserved throughout to the very opinion on the decision from which this appeal is taken. The trial court, in its new findings after remand, distinguished between that portion of the action relating to fraud (governed by limitations expressly covering fraud actions) and that portion relating to breach of statute and implied fraud (governed by the 1941 statute). (Finding XXXII, R. 313-314). The State Supreme Court's opinion on the second appeal followed the same distinction and expressly declined to consider or determine "that phase of the case" relating to "deceit".[6]

Such division by both parties and all courts was logical. Each claim involved different facts and law. Statutory liability required proof only of non-registration, which *per se*, supported recovery.[7] But liability for fraud required proof of scienter, material misrepresentations of fact, and purchaser's reliance thereon to her injury, which were entirely separate from the statutory claim, as appellees' motion for findings on fraud after remand recognized (R. 277-284)

Consequently, appellees' cases, holding that where separately stated claims rest on identical facts they constitute but one cause of action,[8] imply that where, as here, the facts

---

[6] So also did the Circuit Court of Appeals in the case of *Chase Securities Corporation* v. *Vogel* (110 Fed. (2d) 607), which case involved substantially the same type of hodge-podge complaint (See Appellant's Main Brief, pp. 15-16).

[7] *Schaar* v. *Comforth* (1915), 128 Minn. 460, 151 N. W. 275 (statute regulating speed of motor vehicle; see also other statutory violation cases listed in opinion); *Dohm* v. *R. N. Cardozo & Bro.* (1925), 165 Minn. 193, 206 N. W. 377, 378; *Karpeles* v. *Heine* (1919), 227 N. Y. 74 at 79, 124 N. E. 101 at 102; *Olsen* v. *Retzlaff* (1931), 184 Minn. 624 at 628, 238 N. W. 12 at 14; Appellant's Main Brief, pp. 14-15.

[8] See, *e. g.*, *Tuder* v. *Oregon Short Line Ry. Co.* (1915), 131 Minn. 317, 155 N. W. 209; *Seaboard Air Line Ry. Co.* v. *Koennecke* (1915), 239 U. S. 352, 60 L. Ed. 324; *Hurn* v. *Oursler* (1933), 289 U. S. 238, 77 L. Ed. 1148 (Appellees' Brief, p. 52).

required to be proved are not identical, then different causes of action may be, and certainly separate judiciable rights are, involved.

On the first appeal where the application of the proper limitations statute necessarily required a decision on the true nature of the action, the State Supreme Court stated, not "casually" (as suggested by appellees, p. 47) but determinatively, that it was one founded "upon a liability created by statute". The description given the same case on the second appeal, as one in "tort"[9] for violation of a statutory duty of registration, is entirely consistent. Neither the opinion itself nor any authorities cited by appellees support their contention to the contrary.

The decisive test is that a statutory duty, breach of which creates liability *per se*,[10] is one which could not exist but for the statute. It has no basis in common law (Main Brief, pp. 14-15). The distinction between tort actions predicated upon breach of statute and those predicated upon fraud is emphasized in *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, at p. 628, 238 N. W. 12 (involving a bank directors' liability statute). That Court said (p. 14):

> "• • • A violation of the statute gives the right of action. Nothing more is necessary if damage accrues. • • • Simple disobedience to the statute brings liability without the existence of other wrongdoing. • • •
>
> "There is no such action as this at common law. • • • We hold that an action which is based alone on

[9] It is elementary that the word "tort", as applied to a form of action, merely describes an action for breach of a duty, which may have been created by statute or common law. *Bouvier's Law Dictionary, "Tort"; Restatement of Torts*, Vol. 2, Sec. 285-286. The term distinguishes the action from one on contract, as *Drees* v. *Minn. Petroleum Co.* (1933), 189 Minn. 608, 250 N. W. 563, relied upon by appellees (pp. 46-50) so states.

[10] See footnote 7, *supra*, p. 6.

section 10407 [bank directors liability statute] is not an action to recover on the ground of fraud within section 9191(6) [limitations governing fraud actions]."

. . . . . .

"That there may be actual and actionable fraud justifying a recovery, apart from the statute, and within the meaning of section 9191(6), is without much doubt."

And on reargument (184 Minn. 624 at p. 628, 239 N. W. 672):

"A cause of action has come about by the construction of courts because of the violation of a criminal statute. There was no such action at common law; that is, there was no such liability."

This case was followed in *Burzinski* v. *Kinyon Investment Co.* (1934), 192 Minn. 335, 256 N. W. 233 (involving the Blue Sky Law).

Taken in the light of the various phases of this case as they finally developed and were determined, appellees' very insistence that they relied upon four separate "grounds" of recovery, one of which was statutory-breach (Appellees' Brief, pp. 6, 60), itself sustains the independence of the statutory claim from that which remained of the appellees' case, however originally pleaded, after remand on the first appeal.

Whatever terminology is employed, the fundamental reality is that the State Court of last resort specifically and finally determined the one phase of the case submitted to it—namely, that the plaintiff's right of action for breach of the Blue Sky Law was barred. No appeal was taken by the appellees from that decision nor has it ever been over-

ruled by the Court itself. In every sense it was a final adjudication upon that single, separate cause.

The Finality of the Decision on the First Appeal.

Nor can there be doubt as to the finality of the decision on the first appeal. The cause of action (or "claim" or "ground" or "issue") resting on statutory violation was "merged and gone forever,"[11] and thereafter the plaintiff could pursue her suit only in so far as based on other (fraud) issues. To assert that the case was still "pending" on this cause is, under the circumstances, futile. Certainly a case was pending, but only for the determination of the separate cause of action for fraud. Just as certainly it was not pending with respect to any right of action or claim for Blue Sky violation alone. In the latter respect, the determination was final.

Such separate basis of action and the finality of its prior adjudication were recognized in the language of the State Supreme Court on the second appeal,

> "On the trial below the court found in favor of plaintiff on the basis of a violation of the statute. * * * On appeal, this court held that the general six-year statute had run against plaintiff because, notwithstanding the withdrawal of defendant from the state, service of summons could at all times have been made * * *" (R. 403)

and in the language used in its conclusion: "We think it (the proviso) does (apply) even though it was passed subsequent to a determination by this court that the cause was barred"[12] (R. 408-409).

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[11] *United States* v. *Leffler* (1837), 11 Pet. 86, at 100-1, 9 L. Ed. 642, at 647.

[12] The last statement was made in answer to the Court's question "Does the proviso apply to cases already pending?". The use of the

Although appellees insist that every word in the Court's opinion which they consider favorable must be deemed conclusive they do not hesitate to characterize the above quoted words as "inadvertent" (Brief, p. 38). Indisputably, the words were accurate.

This Court also necessarily assumed finality in the determination on the first appeal when, in *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, it reversed a judgment of the Circuit Court of Appeals for the Eighth Circuit against appellant on the merits of an identical claim for liability for non-registration of the same security, and remanded that case "for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the *Pomeroy* and *Donaldson* cases" (on the first appeal).[13]

Even appellees considered the decision final as to the determined question. They promptly moved for amended findings on the fraud claims only (R. 277-284). It was not

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plural "cases" was not inadvertent. The Court was obviously referring to the many cases, similar to the case at bar, awaiting trial after determination of this test case. (The State Supreme Court and this Court may take judicial notice of such cases, officially recorded in the State District Court Clerk's office). Under a strictly literal interpretation of the 1941 statute, the proviso could apply only to actions "brought within a period of one year following such effective date" (July 1, 1941). The Court, having already concluded that the 1941 statute could and did lift the bar of limitations or revive a cause of action, wished to show that cases (like the one at bar) brought *prior* to July 1, 1941 were affected. Applying, however, the proviso to this case, it by-passed the question of prior determination on the first appeal by erroneously relying on *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281, 144 N. E. 579, 582, where a special situation, not here applicable, was presented (Appellant's Main Brief, pp. 31-2), and in effect considered this case "pending" in the same sense as other non-litigated cases against appellant were "pending".

[13] It is significant that, as pointed out in our Main Brief (p. 15), the complaint in the *Vogel* case intermingled allegations of breach of statute with fraud in substantially the same manner as in the case at bar.

until after the enactment of the 1941 statute that they first claimed that their statutory "cause of action" was "revived" by such law (R. 285-286).[14]

Appellees' assertion that the statutory liability phase of the case was "pending" after the judgment on the second appeal, shows the same confused thinking as was evident in the State Supreme Court's opinion which, like appellees, relied upon *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238 N. Y. 271, 144 N. E. 579. There, the Appellate Division had affirmed the lower court order granting defendant's motion to dismiss the complaint on the ground that the action was barred by then applicable limitations. While plaintiff's appeal from that order was pending in the Court of Appeals, the legislature enacted a law which the latter court held applicable to the action because it was pending on appeal on that very issue. The New York Court relied upon some of the same cases which appellees here cite (Appellees' Brief, pp. 39-40), all of which permit application of a subsequent statute to those questions or issues still pending on appeal and as to which the highest state court has not yet made a final determination.[15] Such

[14] The purported revival admittedly being one effected *only* by reason of subsequent legislation and not by a mere overruling or reversal of a prior rule of law, appellees' cases saying that *judicial* reconsideration and reversal does not deprive a litigant of property within the due process clause are not in point. See, e.g., *Tidal Oil Co.* v. *Flanagan* (1924), 263 U. S. 444, 68 L. Ed. 382, and *Central Land Co.* v. *Laidley* (1895), 159 U. S. 103, 40 L. Ed. 91, and other similar cases cited at pages 31-32 of Appellees' Brief.

[15] Representative of these are *Dinsmore* v. *Southern Express Co.* (1901), 183 U. S. 115, 46 L. Ed. 111; *Union Pacific R. R. Co.* v. *Snow* (1913), 231 U. S. 204, 58 L. Ed. 184 and *Gulf C. & S. F. Ry. Co.* v. *Dennis* (1911), 224 U. S. 503, 56 L. Ed. 860. All of them are based upon *United States* v. *Schooner Peggy* (1801), 1 Cranch 103, 2 L. Ed. 49, which, as appellees point out, says "if subsequent to the judgment *and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed * * *." (Italics supplied.)

pendency of the action is so strongly emphasized in these cases that it can be inferred that they, in effect, say that if the action is no longer pending on the question to which the new statute would be applicable, then the subsequent law cannot constitutionally be applied to it.

The other cases cited (Appellees' Brief, pp. 36-38) for their contention of non-finality are distinguishable and constitute, by like inference, authority in support of finality.[16]

Appellees' claim that there could be no final judgment until it was entered by the trial court after remand, is without merit (Appellees' Brief, pp. 35-36). The Supreme Court did enter a judgment of reversal and for costs (R. 363). Moreover, the trial court's formal act in entering its judgment is not necessary to the protection of the Supreme Court's determination as final. As said in *Jordan* v. *Humphrey* (1884), 32 Minn. 522, 21 N. W. 713, the Supreme Court's opinion may be considered to establish that reversal alone constitutes a final adjudication. So, also, this Court

[16] Some of them considered only a determination and remand on questions of pleading or procedure. *Great Western Telegraph Co.* v. *Burnham* (1895), 162 U. S. 339, 40 L. Ed. 991 (the parties should have the opportunity "to make a new case by amendment"), *Haseltine* v. *Central Bank* (1901), 183 U. S. 130, 46 L. Ed. 117 ("the defeated party may amend his pleading . . . and go to trial upon new evidence"), *Aurora City* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42 (a procedural question), and *Hickey* v. *Johnson* (C. C. A. 8th Cir.—1925), 9 Fed. (2d) 498 (a pleading question). Others, like *Moss* v. *Ramey* (1915), 239 U. S. 538, 60 L. Ed. 425, *King* v. *West Virginia* (1909), 216 U. S. 92, 54 L. Ed. 396, and *Messenger* v. *Anderson* (1911), 225 U. S. 436, 56 L. Ed. 1152 involved a reversal or reconsideration of prior rulings in the case while it remained pending in court on all issues. The Minnesota cases which say that a remand "upon all issues in the case", like *Standard Lithographing Co.* v. *Twin City Motor Speedway Co.* (1920), 145 Minn. 5, 176 N. W. 347, or that a prior decision in a *pending* action may be overruled, like *Kozisek* v. *Brigham* (1931), 183 Minn. 457, 237 N. W. 25, are not applicable. The decision here on the first appeal has not been overruled by any court.

in *Gulf Refining Co.* v. *United States* (1925), 269 U. S. 125, 70 L. Ed. 195, held that the judgment of reversal and remand of a case were final where:

> "There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration."

To the same effect are *Mower* v. *Fletcher* (1884), 114 U. S. 127, 29 L. Ed. 117, and *Cole* v. *Violette* (1943), 319 U. S. 581, 87 L. Ed. 1599. Upon no theory can it be said that the adjudication was merely "an interlocutory ruling", as appellees assert without reference to authority (Appellees' Brief, pp. 16, 33, 34, 81). See *Lodge* v. *Twell* (1889), 135 U. S. 232, 34 L. Ed. 153, and 1 Freeman, *Judgments*, Sec. 38, p. 63.

The judgment of reversal on the issue that the action for Blue Sky violation was barred left no possible ground for relitigation of that issue in the trial court. By any test, it was an adjudication on the merits that there could be no recovery on the statutory claim. No new evidence as to that issue was available. A new trial on it would have been useless.

The freedom from statutory liability accorded appellant by the decision was a property right entitled to constitutional protection. *Terre Haute &c. Rd. Co.* v. *Indiana* (1904), 194 U. S. 579 at page 589.

If the decision had been in appellees' favor it is inconceivable that it could be claimed that there was not a final determination vesting in appellees' constitutionally protected rights.

The Finality of the Determination Assures Constitutional Protection.

If, as we believe, the determination on the first appeal was final in barring the statutory claim, it follows that such issue was not pending when the 1941 statute was passed.

If, as we also believe, the premise of finality is sound, it follows that appellant had a vested property right in such determination, which could not be abrogated by the 1941 statute in violation of the due process clause. We have found no case where this Court has departed from the well-established rule that a final "judicial judgment"[17] vests rights in favor of the successful party, which are constitutionally protected from later legislative action. *McCullough* v. *Virginia* (1898) 172 U. S. 102, 43 L. Ed. 382; *Hodges* v. *Snyder* (1923), 261 U. S. 600, 67 L. Ed. 819. See other cases, Main Brief, page 18. Appellees do not question the principle of these cases or their applicability, if, as a matter of law, the decision on the first appeal was final and determinative of the statutory claim.

Appellees' asserted distinction of *Pope* v. *United States* (1944), ... U. S. ....., 89 L. Ed. 5 (see our Main Brief, pp. 19-20; Appellees' Brief, p. 41), that there "an unreversed judgment conclusively established that a claimant was not entitled to recover", emphasizes its applicability to the case at bar.[18] The judgment was as final and involved

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[17] As distinct from "administrative orders". *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370 at p. 381; footnote 25, 84 L. Ed. 814.

[18] None of the other cases cited in this subsection of their brief (pp. 41-2) considered and decided the constitutionality of a statute, under the federal due process clause, as applied to relitigation of an issue. *Guilford* v. *Western Union Tel. Co.* (1894), 59 Minn. 332, 61 N. W. 324; *State of Wisconsin* v. *Torinus* (1881) 28 Minn. 175, 9 N. W. 725; *West Side Ry. Co.* v. *Pittsburgh Const. Co.* (1911) 219 U. S. 92, 55 L. Ed. 107. They afford no precedent helpful to appellees' contention.

as much a right of property in favor of the defendant here as in that action.[19]

The State Supreme Court's decision on the second appeal, that the 1941 statute applied even in the face of a prior "determination" by that court "that the cause was barred", was contrary to this principle, again recently observed, in *Demorest* v. *City Bank Farmers Trust Co.* (1944), 321 U. S. 36 at 48, 88 L. Ed. 340, at 347, which sustained the constitutionality of a statute because:

> "This statute does not purport to open accountings already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements pending at or instituted after its enactment."

APPELLANT'S POINT II.

The Statutory Right of Action Expired by Limitations Prior to the 1941 Statute—Campbell v. Holt Considered.

(Appellant's Brief, pp. 20-35; Appellees' Brief, pp. 56-74.)

Appellees' summary of appellant's contentions on Point II is so confusing that we restate them briefly: (1) The State Supreme Court on both appeals held the Blue Sky phase of the action to have been one founded upon a liability created by statute. The then existing limitation statute conditioned the appellees' right to recover and extinguished it by passage of time (Appellant's Brief, pp. 21-24). (2) The Court erred in applying *Campbell* v. *Holt*, which involved only a common law action on contract

[19] It must not be overlooked that the State Supreme Court actually entered a judgment of reversal as well as for costs (R. 363) in spite of appellees' statement that this was merely a judgment for costs. (Appellees' Brief, p. 33.)

or debt (*Ib.*, pp. 24-27). But (3) if seemingly applicable, the *Campbell* case is erroneous in principle and should be overruled (*Ib.*, pp. 27-35).

Appellees claim: that the question is one of construction of the limitations statute relating to actions "upon a liability created by statute"; that the State Court (second appeal) held such statute to be one affecting remedy only; and that such declaration was a matter of local law not reviewable by this Court (Appellees' Brief, pp. 56-58).

For these contentions, they cite only two decisions of this Court, both of which hold merely that the State Court's construction of a state statute of limitations (that is, what the words of the statute mean) is binding upon this Court.[20]

Assuming, *arguendo*, this to be true, the question here presented is not one of "construction", *viz.*, meaning of words used, but solely of the legal effect of an unambiguous prior statute (limiting actions on a liability created by statute) upon a subsequent and equally unambiguous statute (the Blue Sky Law) creating a new statutory liability. Narrowing the question, it is one of the legal effect of the conceded expiration of the 6-year limitations period relating expressly to actions on a liability created by statute, upon the liability so created, i. e., whether such expiration vested in appellant a right of freedom from that liability within the term "property", as used in the due process clause, of which it could not constitutionally be deprived by the 1941 statute. Unless this Court is free to determine that question—and every phase of that ques-

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[20] In *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.* (1873), 20 Wall (87 U. S.) 137, 22 L. Ed. 331, it was said that the State Court's decision that a foreign corporation could not avail itself of the limitations statute was a "construction of the statute . . . binding upon us". In *Seneca Nation v. Christy* (1895), 162 U. S. 283, 40 L. Ed. 970, it was held that the "proper construction" of the limitations statute "and the time within which an action might be brought" was for the State Court.

tion—for itself, it would, practically speaking, be abdicating in favor of the State Court.

This Court has consistently refused so to abdicate in the many cases in which the contention was pressed upon it that the declaration of the State Court, that a statute raised only a question of remedy, was binding upon and not reviewable by this Court on constitutional grounds. *Terre Haute and Indianapolis Rd. Co.* v. *Indiana* (1904), 194 U. S. 579, 48 L. Ed. 1124; *Truax* v. *Corrigan* (1921), 257 U. S. 312, 66 L. Ed. 254; and *Home Insurance Co.* v. *Dick* (1929), 281 U. S. 397, 74 L. Ed. 926.[21]

A fortiori, this is true in a case such as at bar, where the State Court, in deciding this very question from the standpoint of the Federal Constitution, has expressly relied upon a decision of this Court (*Campbell* v. *Holt*) saying that "certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court" (R. 408).

In final analysis the question here presented is a federal one. In its determination this Court is not ousted from jurisdiction by the state court's characterization either of the right vested in appellant by the running of the statutory bar prior to the passage of the 1941 statute, or as to the legal effect of that statute upon that right.

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[21] Appellees' cases (Brief, p. 45) purportedly holding this right against remedy question to be one of local law are either not in point or actually sustain our contention. See, e.g., *First National Bank* v. *Anderson* (1925), 269 U. S. 341, 70 L. Ed. 295. Two of the cases cited by appellees (on other points) support the same rule. *Schuylkill Trust Co.* v. *Pennsylvania* (1935), 296 U. S. 113, at p. 119, 80 L. Ed. 91, and *West Side Belt Rd. Co.* v. *Pittsburgh Construction Co.* (1911), 219 U. S. 92 at 102, 55 L. Ed. 107.

Campbell v. *Holt is Not Applicable.*

Appellees again insist that there is a "single cause of action grounded upon blended violation of the Blue Sky Law and common law fraud" and that the statutory claim was not barred before the 1941 statute (Appellees' Brief, pp. 59-61). This we have already answered (*supra*, pp. 2-9).

Appellees' emphasis on the fact that *Campbell* v. *Holt* involved only a common law action on a contract supports our contention that it is inapplicable to the case at bar. As this Court said in that case, the contract nature of the action was "important" to that decision (115 U. S. at p. 622), and it was the basis of this Court's holding it inapplicable to the action based upon statute in *Danzer Co. v. Gulf Ry. Co.* (1925) 268 U. S. 633, 69 L. Ed. 1126. In the case at bar, the appellees have never claimed nor have the State Courts suggested that appellant's liability was upon contract. At all times, the purely statutory character of the asserted liability has been judicially recognized.

The importance of this distinction in the basis of liability, and the error of the State Court's refusal to hold that appellees' substantive right of action was conditioned and extinguished by the original limitations statute specifically covering actions upon "liability created by statute" (Main Brief, pp. 20-27) are shown by analysis of the true nature of the claim for breach of the registration statute.

From 1929 until 1935 appellant was subject to a serious liability imposed by the Blue Sky Law and the appellees' testatrix was in a most enviable position. She had the benefit of her stock purchase if the market price rose, and could recover her purchase price with 6% interest if the market fell. She had both the Bank stock she had purchased and also the credit of the Securities Corporation

(with a capital of over $66,000,000 at the time of sale, R. 238) to secure a judgment for return of purchase price if she elected to rescind. She could not lose. The seller (appellant) could at no time go to the purchaser, rescind and thus discharge the statutory liability. Only the passage of the limitations period could free it from that liability.

During the six-year period the sale was voidable only, at the option of the purchaser, *Edson* v. *O'Connell*[22] (1934), 190 Minn. 444, 252 N. W. 217; *Mertz* v. *H. D. Hudson Mfg. Co.* (1935), 194 Minn. 636, 261 N. W. 472.

In Stock Exchange parlance, the purchaser actually had a right to "put" the stock back to the seller at any time within the limitations period of six years from August, 1929, and receive her money back. After the expiration of that period, no such privilege (and no correlative liability of the seller) remained.

It follows that the State Supreme Court's application of the 1941 statute to this transaction in legal effect did more than merely remove the bar to, or revive appellees' old right of action. It created a new liability which, when related back to the old liability, which had expired six years before, covered an additional seven years (from August 1935 to July 1, 1942). The result of this holding was to transform the original six year option to rescind, into a thirteen year option.

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[22] The *Edson* case (after referring to the earlier cases of *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672, *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806, and *Drees* v. *Minnesota Petroleum Co.* (1933), 189 Minn. 608, 250 N. W. 563), said (252 N. W. at p. 218):

> "It follows that the purchaser of stock obtains a good title, and the sale is not as to him void, but voidable."

This Court in *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.* (1941), 312 U. S. 38, 85 L. Ed. 500, held that a contract for sale of securities not registered as required by the Federal Securities Act was not void.

The essence of the majority opinion in the *Campbell* case was that mere passage of time does not *discharge* a just debt. The implication is that the obligor was at all times under a duty to and *could* discharge that debt by payment. In the case at bar this analogy fails. As we have pointed out (*supra*) the seller here could not at any time elect to rescind and demand back the stock against repayment of purchase price. That option was vested in the purchaser alone. Until the latter elected to exercise it, the seller, although at all times since the sale under liability to comply with sellers demand if and when made, had no "debt" which it could discharge.

The unfairness of this unilateral liability was recognized and corrected in the very 1941 statute here involved, the seller now having for the first time the privilege of repurchasing the stock in advance of any demand by the purchaser.

The case at bar is governed, therefore, not by the principle of the *Campbell* case but by that of the *Davis* and *Danzer* cases.

This Court in unmistakable language in *Davis* v. *Mills*, (1904) 194 U. S. 451, 48 L. Ed. 1067, pointed out that, as a matter of sound public policy, courts have been and should be willing to consider limitations statutes as conditioning and limiting the right of action given by another statute, even though the limitations statute was enacted "at a different time" (p. 456) and was located "in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right" (p. 454). In the *Davis* case an 1895 statute, imposing liability upon corporate "trustees" for debts of the company upon their failure to publish its annual financial report, was held to be conditioned and limited by a separate and subsequently enacted limitations statute covering ac-

tions against either "directors" or "stockholders", for the purpose of enforcing either a "penalty or forfeiture" or "a liability created by law".

In the case at bar, the limitations statute (Sec. 9191 (2)), while broader as to classes of obligors, was more restrictive by its terms as to the classes of liabilities covered, i. e., only those "upon a liability created by statute", and expressly excluded actions for penalty or forfeiture.

Appellees urge, however, that because the limitation statute preceded by many years the liability statute, the earlier statute could not have been directed toward a liability statute that was not in existence at the time.

This argument will not survive analysis.

When the legislature enacted subdivision 2 of section 9191, providing that an action upon a liability created by statute, other than upon a penalty or a forfeiture, should be brought within six years, it created a special limitation as to a limited class of actions, applicable not only to those based upon liabilities created by existing statutes, but necessarily equally applicable to liabilities (other than penalties or forfeitures) created by subsequent statutes. When the Blue Sky Law was enacted in 1917 and revised in 1925, the legislature had before it the existing limitations statute, which provided an explicit limitation pattern into which this type of action fitted just as precisely as if the words of subdivision 2 of such statute had been repeated verbatim in the Blue Sky Law. Unless the legislature had then desired to alter the perfectly applicable, already existing, six year period of limitations, it had no occasion or reason to include any words of limitation in the Blue Sky Law. That the legislature had no such desire is conclusively demonstrated by the fact that it then provided no such alteration, and by the fact that in the 1941 general

revision of the Blue Sky Law, it provided for this same 6-year limitation period.

Upon the clearly stated principle of the *Davis* case, we therefore repeat that it is immaterial that the original limitations section here involved was enacted prior to the liability statute. Otherwise, "an unsubstantial distinction" (p. 456) would be given controlling effect in constitutional law.

Appellees' statutory right of action, conditioned as it was by the existing limitations statute, was extinguished by the running of the original statutory period. Appellant's freedom from liability thereby became a vested property right within the protection of the due process clause, which could not be abrogated by subsequent legislative action. *Danzer Co.* v. *Gulf Ry. Co.* (1925), 268 U. S. 633, 69 L. Ed. 1126.

Hence, *Campbell* v. *Holt*, in which solely a non-statutory right of action was involved, is not decisive of appellant's rights and the State Court erred in treating it as binding on the federal constitutional question presented.

The Error of Campbell v. *Holt.*

Appellees do not challenge appellant's showing (Main Brief, pp. 27-32): that in the 60 years following *Campbell* v. *Holt*, this Court has not once applied its holding to sustain the revival of a barred cause of action; that such holding is contrary to the established public policy against revival of "ancient claims" followed by this Court for over 125 years; that the majority of state courts, and virtually all legal writers on the subject have expressly followed the principle of the dissenting opinion; and that the federal courts have applied the case only to a tax claim revival statute, which, in *Graham* v. *Goodcell* (1931), 282

U. S. 409, 75 L. Ed. 415, was finally sustained on an entirely different (curative statute) ground.[23]

Appellees, thus, seem to admit the validity of the foregoing but claim that the 1941 statute should be sustained on the ground of a special equitable consideration, such as was involved in *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238 N. Y. 271, 144 N. E. 579.

Neither the trial court nor the Minnesota State Supreme Court sustained constitutionality upon that ground. Much less does the record show any evidence to support such a claim.

We have already shown (Main Brief, pp. 32-33) that appellees have no special equity to warrant the application of the cautiously considered cases of *Robinson* v. *Robins Dry Dock & Repair Co., supra, Danforth* v. *Groton Water Co.* (1901), 178 Mass. 472, 59 N. E. 1033, and *Dunbar* v. *Boston & P. R. Corp.* (1902), 181 Mass. 383, 63 N. E. 916. Whatever the merit of those decisions upon their respective facts, each virtually conceded that the majority and better general rule was against revival of a barred claim. Each reluctantly permitted "revival" only by resort to dubious reasoning described by Justice Holmes in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, as "various circumlocutions" in order to overcome "some slight technical defect" or to attain "some strongly prevailing view of justice."[24]

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[23] This Court considered matters of this character in its review of *Swift* v. *Tyson*, in the light of public policy, and the overruling of that case in *Erie Railroad Co.* v. *Tompkins* (1938) 304 U. S. 64, 82 L. Ed. 1188.

[24] Contrary to appellees' intimation, at p. 69 of their brief this Court's reference to these cases in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814 (at footnote 17) does not suggest approval of their rule as applied to judicial, as distinct from administrative, proceedings and when the cause of action has already become barred.

The purchaser had adequate means of ascertaining the violation and could have sued immediately after the sale and for six years thereafter. Non-registration was constructively notorious. The files and records of the Commissioner of Securities, and Blue Sky regulations and requirements, were public and open. The fact of non-registration of this security could have been ascertained by the purchaser by a telephone call or letter [25] at any time before or after the sale on August 10, 1929. The Blue Sky Law required registration data to be recorded in the Commissioner's office. (Mason's 1927 Minn. Stat., §3996-5; Minn. Stat. 1941, Sec. 80.08). Non-registration could not have been effectively concealed from her.[26] If she was unaware of the seller's wrong for more than the six years, it was the result of her own indifference, as to which she can claim no equity here.[27]

Nor do any of appellees' arguments as to "kinds" of tort claims (p. 64), or as to the claimed injustice in the State Supreme Court's 1941 decision against appellees on the tolling statute (p. 69), or as to the so-called "benefits"

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[25] The record in the State Court (second appeal) filed with this Court shows that the Commissioner's office advised appellees counsel as early as July of 1935 (two years before this action was commenced) that the Chase National Bank Stock (part of the combined unit) was not registered. (R. 1014, Defendant Ex. 1.) The exhibit, among others, was omitted from the printed record on the appeal to this Court. There is no doubt that such information was at all times available.

[26] The findings of the trial court, as to the cause of action for fraud, were expressly not determined by the State Supreme Court and are not involved in any issue now before this Court.

[27] The record shows that plaintiff was a person of at least average education and background, that she was well advised by her husband and family who were active in investment business (R. 83-103; 108-133) and that at the time of the purchase she knew of the state Securities Commission, its function to "look into stocks" and to register only "reliable stocks" (R. 90, f. 179), and that the state had certain "legal requirements" on stocks sold (R. 87, f. 174).

of the 1941 law (p. 72), establish any equity in favor of appellees.

Even if her statutory claim be one in "tort", it is based on purely statutory liability and the state court's adjudication that the six-year limitations period ran from the date of sale (not from date of alleged discovery of the breach of statute) is conclusive here. Furthermore, the few cases which have permitted revival of barred claims on the "equitable consideration" theory have done so, not upon any special equity arising from the nature of the claim itself but only because of seeming injustice or inequity arising entirely from the absence of a reasonable period of time within which to commence the action. (See, *e.g., Robinson* v. *Robins Dry Dock and Repair Co., supra,* p. 23.) Here, no claim is made or could be made that the original plaintiff did not have the full six-year period which was well established and well known as a matter of law and which obviously was a reasonable period.

Likewise, the state court's final determination that she did not have the benefit of the tolling statute created no equity. There is no proof in the Record that she ever knew of appellant's removal from the state, or that she was induced thereby to believe the statute had been tolled and hence was lulled into non-action. She therefore cannot now claim that she is entitled to a special rule of law because the six-year period, available to her, was not extended indefinitely.

If any general "benefits" policy can be read from the entire 1941 statutory provision, it is that the legislature intended to place a well-defined six-year limit on actions to recover for sales of securities made in violation of the Blue Sky Law. Certainly there is no indication of an intention to revive, for one year, odd and sundry causes of action

as to holders who might claim some special equity. Nor did the State Supreme Court find any such intention of the legislature, even in the course of its unwarranted excursion into factual matters unproved. It allowed revival in favor of all purchasers of such stock from appellant, without regard to whether or not the purchaser had actual and immediate knowledge of the violation of the statute.

Finally, the cases which appellees' claim are analogous (Appellees' Brief, pp. 74-75, footnote) are so strictly limited in character as to support on principle our contention that in this and like cases the rule of *Campbell* v. *Holt* is contrary to sound public policy and should be overruled. Thus, *McNair* v. *Knott* (1937), 302 U. S. 369, 82 L. Ed. 307, which cites at least four of the other decisions, holds that the statutes described as "remedial," "curative" or "enabling" laws, which merely validate contracts or transactions according to the intentions of the parties, are proper. *United States* v. *Heinszen* (1907), 206 U. S. 370, 51 L. Ed. 1098 and *Rafferty* v. *Smith, Bell & Co.* (1921), 257 U. S. 226, 66 L. Ed. 208, held merely that Congress could ratify what it could have done in the first place, in the levy of taxes. *Luria* v. *United States* (1913), 231 U. S. 9, 58 L. Ed. 101, held that a rule of evidence could be changed retrospectively. It is to be noted, also, that not one of these cases relies upon the broad holding of *Campbell* v. *Holt*.

Appellant had a vested property right in the freedom from liability, once the statutory period had run, which was entitled to constitutional protection against legislative interference, *Terre Haute and Indianapolis Rd. Co.* (1904), 194 U. S. 579, 48 L. Ed. 1124. It was entitled to the same protection under the due process clause, as this Court has given to accrued rights of action which legislatures have

attempted to extinguish, *Ettor* v. *Tacoma* (1912), 228 U. S. 148, 57 L. Ed. 773, and *Coombes* v. *Getz* (1931), 285 U. S. 434, 76 L. Ed. 866.

APPELLANT'S POINT III.

Equal protection denied.

(Appellant's Brief, pp. 35-40, Appellees' Brief, pp. 77-81).

In answer to appellant's contention that the 1941 statute deprived appellant of equal protection of the laws, appellees urge little which has not already been anticipated and answered in appellant's Main Brief (pp. 35-40). The gist of appellees' claim is that the proviso is one which, by its wording, applies to all sellers and types of securities; that the court did not interpret it to apply only to appellant and National City Company, but, rather, that its comments about the law's application to those companies were merely a listing of reasons or motives which prompted the legislature to enact such a law.

The statute on its face is general in scope and nowhere singles out the appellant and National City companies by express mention. However, when the court came to apply the statute, it was confronted with a general limitation of six years followed by the proviso. In order to avoid the usual interpretation of a proviso as a limitation on the exercise of the general scope of the statute, the Court found it necessary to say: that there would be few if any cases to which the law would apply if the proviso were construed as a limit on the six year period; that the legislature knew about many cases pending against appellant and the National City Company and the decision of the Court on the prior appeal holding such Blue Sky actions barred; and

that the legislature must have intended to lift the bar of six years in respect to those very cases and these particular companies. This is a case where language of general import has been re-made in such fashion by Court interpretation as to relate particularly to appellant and one other company upon the assumption that these were the only companies to which the law could apply, and as we pointed out in our Main Brief, a classification including these companies particularly for extension of the statute of limitations is not a reasonable one (Appellant's Brief, pp. 38-40).[28]

We say "assumption", because, as we show in our next point, the legislature had no such intent in mind, a fact which appellant has not been permitted to show.

APPELLANT'S POINT IV.

Fair trial denied.

(Appellant's Brief, pp. 40-49, Appellees' Brief, pp. 85-88).

The State Supreme Court's assertions as to the "plain" or "clear" language of the statute (R. 405, 406) are nullified by its lengthy findings of legislative intent and its ultimate conclusion that the statutory language "and the circumstances under which the law was enacted" (R. 406) warranted the application of the law to this case. To reach this result, the so-called "clear" language had to be remade by judicial disregard of the word "provided"—the key word of the proviso clause. Why, if the legislative

[28] This is similar to the situation where a law, general in terms, is capable of application to a special situation only, and, therefore, violative of State Constitutional safeguard against special legislation. *Lodoen* v. *City of Warren* (1920) 146 Minn. 181, 178 N. W. 741; *Nichols* v. *Walter* (1887) 37 Minn. 264, 33 N. W. 800.

language was so clear and plain, did the Court rely so heavily upon extraneous circumstances? Appellees have not given any answer to this determinative aspect of legislative intent.

Their brief distinction of *Ohio Bell Telephone Co.* v. *Public Utilities Commission* (1937), 301 U. S. 292, 81 L. Ed. 1093, is itself a concession. Of it, they say, "There the evidence offered went to a vital factual issue in the case" (p. 84). That is exactly the nature of the evidence appellant sought to offer on the vital (if not controlling) issue of legislative intent (Main Brief, p. 46). As is said in their own cited case (*United States* v. *Missouri Pacific Ry. Co.* (1929), 278 U. S. 269, 73 L. Ed. 322), significant circumstances leading up to a law may be "noticed". Such judicial notice, however, must be employed in accordance with the principles of the *Ohio Bell* case.

The primary question here is not as to the admissibility of one kind of evidence or another, but solely whether appellant is to have the opportunity, guaranteed by the Fourteenth Amendment, of a fair trial on the factual question of legislative intent and the opportunity (not yet afforded) to offer evidence thereon. Consequently, appellees' argument and cases, as to claimed incompetency of the offered proof (pp. 86-88) are irrelevant to the due process question presented.[29]

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[29] If relevant here, we have shown that the offered evidence was competent. (Main Brief, p. 46.) Excepting *Soon Hing* v. *Crowley* (1885), 113 U. S. 703, 28 L. Ed. 1145 (which considered only intent of the city council as to an ordinance), and *Helvering* v. *City Bank Farmers Trust Co.* (1935), 296 U. S. 85, 80 L. Ed. 62 (which held that the statutory language was too clear for consideration of proof of intent), the several cases of this Court cited by appellees (pp. 87-88) did receive and consider evidence of legislative reports, debates and statements of sponsors.

V.

All constitutional questions were seasonably raised and this Court has jurisdiction on appeal.

1.

Denial of Due Process by Statutory Abrogation of Final Judgment.

(Appellant's Point I, Main Brief, p. 13, Appellees' Brief, pp. 27-32.)

The Point was Seasonably Raised.

Appellees do not challenge the correctness of our summary of the procedural steps on this point, as we fully presented them in our Jurisdictional Statement (pp. 6-10 thereof) and which we again summarized in our Main Brief (pp. 6-11). They are briefly, as follows:

Appellant, promptly on its alternate motions to the trial court for amended findings or a new trial, asserted error

> (a) in the making of Finding of Fact XXXII, declaring the statutory claim to have been revived by the 1941 statute (R. 318, at 323, par. No. 22; R. 338, par. 13);
>
> (b) in the making of the related conclusions of law (R. 347, par. 23 and 24);
>
> (c) in the failure to substitute a conclusion of law that the action was barred and not revived by the 1941 law (R. 326, par. 29);

which motions were made upon the ground that the statutory claim was barred by the prior mandate of the State Supreme Court (R. 328, par. 4 and 6; R. 348, par. 3) and that if the 1941 law was so construed to effect revival, it would deny appellant its property without due process

of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States (R. 338, par. 13(c)).

After the adverse trial court decision, appellant assigned to the State Supreme Court error in the denial of its alternative motions just reviewed, generally, (R. 364, par. 4) and *specifically* as to said Finding XXXII, the error of the trial court in making such finding, the error in denying appellant's motion to strike the same and substitute another finding, and the error in denying appellant's motion for a new trial (R. 384-386), citing the State Supreme Court to the particular motions, above stated in the trial court.

We know of no case or rule in Minnesota practice which requires, as appellees' comment implies (Appellees' Brief, pp. 27-28), that an appellant must include "argument" or "grounds" as to each of the errors assigned. Rather, the State Supreme Court has expressly held that such matters should not be included in the assignment of errors.[30]

Within established procedure, appellant seasonably and properly raised the point relating specifically to prior and final judgment. This appellees expressly admitted in their "Response to Petition for Rehearing" when they said, "the claim of vested adjudication was raised by petitioner on the appeal" (R. 470, f. 1929). It was argued in the briefs, within the contemplation of their own cited case, *Peterson* v. *Pete-Erickson Co.* (1932), 186 Minn. 583, 244 N. W. 68 (Appellees' Brief, p. 29).

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[30] Minnesota Supreme Court Rule VIII, par. 3(d) merely states, "Assignments of error shall be separately and concisely stated and numbered, without repetition." (212 Minnesota Reports, xlii.) The Minnesota court in *Lestico* v. *Kuehner* (1938), 204 Minn. 125, 283 N. W. 122, at 127, denied statutory costs to an appellant who included "as part of each assignment, a summary of the argument, later elaborated, in its support."

If there could be any valid doubt, the State Supreme Court's opinion shows, what the record of the case establishes, that the constitutional law claims on Point I (as well as Point II) were raised before and decided by the highest State Court. The opinion is itself conclusive on the matter.[31]

The cases appellees rely upon here are not pertinent (Brief, pp. 29-30).[32] Appellant here did preserve the constitutional questions adequately and within the view of this Court in *Schuylkill Trust Co.* v. *Pennsylvania* (1935), 296 U. S. 113; 80 L. Ed. 91 (cited by appellees at p. 30) where the trial court motions and appellate court assignment of errors were in substantially the same form as in the case at bar and contained no argument of constitutional grounds.

A Federal Question Is Presented.

Our argument upon the merits of this point establishes that the prior adjudication was final upon the single issue

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[31] This Court has long held that it will review "contentions with specific reference to the Constitution of the United States" which were discussed and decided in the State Court's opinion, even where the appellant failed to mention them in his assignment of errors. *Nickey* v. *Mississippi* (1933), 292 U. S. 393, 78 L. Ed. 1323, and cases there cited; also, numerous cases of this Court cited in *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, Sec. 77, p. 130-133.

Furthermore, this Court has repeatedly held that it will examine the record to determine the presence of a federal question even though it was not decided by the State Supreme Court in express terms, but only "in substance and effect". *Ward* v. *Love County* (1919) 253 U. S. 17, 64 L. Ed. 751; *Schuylkill Trust Co.* v. *Pennsylvania, supra*. Mere silence of the State Court on the federal question, actually present, will not affect this Court's jurisdiction of the case. *McCullough* v. *Commonwealth of Virginia* (1898), 172 U. S. 102, 116-117, 43 L. Ed. 382.

[32] See, for example *Godchaux Co.* v. *Estopinal* (1919), 251 U. S. 179, 64 L. Ed. 213, *American Surety Co.* v. *Baldwin* (1932), 287 U. S. 156, 77 L. Ed. 231, and *Herndon* v. *Georgia* (1935), 295 U. S. 441, 79 L. Ed. 1530, where federal questions were not presented to or decided by the highest state courts, but were urged for the first time on petitions for rargument which were summarily denied.

of statutory violation, and vested a right of property in appellant, which is subject to the protection of the due process clause as against subsequent legislative interference. Of necessity this is a federal question.

2.

Denial of Due Process by Statutory Revival of Barred Statutory Claim.

(Appellant's Point II, p. 20; Appellees' Brief, pp. 53-58).

The Point was Seasonably Presented.

In answer to appellees' like contention on Point I, we reviewed the record and the opinion of the State Supreme Court and showed that both Points I and II were not only raised seasonably and in proper form, but that the State Court actually decided the question against appellant (*supra*, pp. 30-32). In the face of this record, appellees' suggestion (Brief, pp. 54-55) that the opinion does not say in so many words that appellant raised the point or show that the court's "holding on the point was responsive to any contention made by appellant," cannot be taken seriously.[33] Appellees expressly concede and state that appellants did raise the issue of due process (Appellees' Brief, p. 19).

A Federal Question is Presented.

Appellees claim that the State Supreme Court characterized the original bar of the statute of limitations to

[33] Appellees' case, *Lovell* v. *Griffin* (1937), 303 U. S. 444, 82 L. Ed. 949, fully sustains our claim that the question was properly raised and decided. *Clarke* v. *McDade* (1896), 165 U. S. 168, 41 L. Ed. 673, and *Osborne* v. *Clark* (1906), 204 U. S. 565, 51 L. Ed. 619, are clearly not applicable since the federal question in each case was not raised or decided even in the highest State Court.

this claim for breach of statute as one affecting remedy only, and that such declaration constituted a determination of local law, which cannot now be reviewed by this Court (Appellees' Brief, pp. 56-58). This has been fully answered. (*Supra*, pp. 16-17).

3.

Denial of Equal Protection of Law

(Appellant's Point III, p. 35; Appellees' Brief, pp. 75-77).

Contrary to appellees' claim, we submit that the point was seasonably raised on the Petition for Rehearing in the State Supreme Court which was appellant's first opportunity of so doing (Point V of Petition for Rehearing, (R. 446-52)).

It is well settled in this Court that if the ruling of the State Court could not have been anticipated and a constitutional right has been denied for the first time by a ruling made on appeal, a litigant, thus surprised, may challenge such ruling in his Petition for Rehearing and the challenge is timely. *Saunders* v. *Shaw* (1916), 244 U. S. 317, 61 L. Ed. 1163; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner* (1930), 281 U. S. 313, 74 L. Ed. 870; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107; and *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, 77 L. Ed. 360.

The Supreme Court's interpretation of the 1941 statute as one directed against appellant and National City Company was unanticipated by both parties. Appellees did not, either in the trial or Supreme Court, contend therefor. The trial court's indefinite finding as to the applicability of the statute (Finding XXXII, third paragraph, R. 313-314), which it refused to clarify upon appellant's specific motion

(R. 338) did not forewarn appellant of the Supreme Court's interpretation. No evidence was offered on that score (which is the basis of our Point IV), nor do appellees now point to any ruling or indication of either the trial or Supreme Court which suggested its possibility. Their cases (p. 83), therefore, are not relevant.

4.

Denial of Fair Trial

(Appellant's Point IV, p. 40, Appellees' Brief, pp. 82-85).

The Point was Seasonably Presented.

Upon the same decisions of this Court, cited for the comparable question under Point III (*supra*, p. 34), we submit that the State Supreme Court's resort to facts and circumstances, extraneous to the record, to ascertain the intent of the legislature could not have been anticipated prior to the opinion, and that appellant raised the constitutional objection at its first opportunity (Petition for Rehearing, Point II 2, R. 417-420). Furthermore, appellees answered the point, so raised, in their Response to Petition for Rehearing (R. 463, at 470-473): *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, at 366, 77 L. Ed. 360, at 367 suggests that this fact inclines the Court to say the point was seasonably raised.

Granted that appellant should have anticipated a general construction of the 1941 statute against it, as indicated by its objections on the basis of the due process clause, (Points I and II), there is nothing in the record to suggest that appellant reasonably could have expected that the State Supreme Court would rely upon factual matters not

of record, in order to find a legislative intent, admittedly in conflict with the word "provided". Nor do appellees contend that there is any record proof to support such an intent.

A Federal Question is Presented.

Appellees say that the question is not a federal one because it arises out of a matter of local trial practice and relates to the admissibility of evidence. See, in this connection, our argument, *supra,* at pp. 16-17.

Even though the ultimate question is one of State law, such question must be decided in accordance with due process. Both parties must have a fair opportunity to be heard. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, the interpretation of a State tax law was admittedly one solely for the state court. Judgment was reversed, however, because a fair trial had not been granted appellant. This Court said (pp. 681-2):

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

See, also, *Baltimore & Ohio Ry. Co.* v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

Conclusions.

For all the reasons given in our Main Brief and in this Reply, we respectfully submit that appellees' motion to dismiss or affirm should be denied and that the judgment appealed from should be reversed upon any one or all of the four grounds urged.

Dated: February 26, 1945.

Respectfully submitted,

HENRY ROOT STERN,
FREDERICK H. STINCHFIELD,
SAMUEL S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

RUTH CHASE DONALDSON (FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED), SUBSTITUTED AS RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GEORGE B. LEONARD,
HYMAN EDELMAN,
S. P. GISLASON,
Counsel for Appellees.

LEONARD, STREET AND DEINARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

RUTH CHASE DONALDSON (FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED), SUBSTITUTED AS RESPONDENTS,

Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Statement of Case.

This is an action in tort, to recover as damages the purchase price of unregistered securities sold on August 10, 1929, in Minnesota by appellant to plaintiff,[1] in violation of the Minnesota Securities Law (Mason's Minn. Stats. 1927, Sec. 3996-1, et seq.), which required their registration. The securities sold consisted of eight shares of the capital stock

[1] By 'plaintiff' herein we refer to Ruth Chase Donaldson, the original plaintiff, who died while the appeal to the Supreme Court of Minnesota was pending.

of Chase National Bank of New York, in combination with eight shares of the capital stock of appellant, Chase Securities Corporation, its securities affiliate. These shares of stock were inextricably linked together, were evidenced by a single indivisible receipt issued by Bankers Trust Company acting as a depository, and were sold only as indivisible units for a lump sum indivisible price. The shares in the Bank could not be transferred without a simultaneous transfer of the shares in the securities affiliate, and vice versa. For brevity, the combined shares will hereinafter be referred to as "Chase units."

Grounds of Plaintiff's Cause of Action.

Plaintiff alleged only one cause of action based on a single sale, and sought to recover on four separate and independent grounds of recovery:

1. The illegal sale by appellant to plaintiff of unregistered stock by its unlicensed salesman, in violation of the Minnesota Securities Act, rendered the sale void, and appellant became liable in tort for the purchase price.

Drees v. *Minn. Petroleum Co.*, 189 Minn. 608, 250 N. W. 563.

Illegality of the sale arose out of the fact that appellant was an investment and not a banking corporation. Its stock, therefore was subject to registration under the Securities Act, notwithstanding that bank stock was exempt.

Commissioner of Securities v. *Chase Securities Corporation*, 298 Mass. 285, 10 N. E. (2d) 472; Appeal to U. S. Supreme Court, dismissed, 302 U. S. 661, 82 L. Ed. 510.

Limitations as to recovery on this ground, prior to July 1, 1941 (effective date of Minn. Stats. 1941, Sec. 80.26; Laws

of Minnesota for 1941, Ch. 547, Sec. 18) were governed by the general six-year Statute of Limitations (Mason's Minn. 1927 Stats., Sec. 9191). The Securities Act itself had no special limitation provision.

Burzinski v. *Kinyon Investment Co.*, 192 Minn. 335, 256 N. W. 233.

As to this ground of recovery, plaintiff having shown that appellant withdrew from Minnesota in 1931, contended that the period of its absence was to be excluded in computing the limitation period under Mason's Minn. 1927, Stats., Sec. 9200 (tolling statute).

2. Appellant's sale and delivery of securities to plaintiff constituted an implied representation that it had complied with the Securities Act by registering said securities and licensing its agents, and that its stock was legally sold to plaintiff. Present scienter, appellant was liable in fraud for the falsity of those representations.

Mary Pickford v. *Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102;

Le Sage v. *Title Guaranty and Trust Co.*, 12 Cal. (2d) 531, 86 Pac. (2d) 115;

Bartlett v. *Suburban Estates*, 12 Cal. (2d) 527, 86 Pac. (2d) 117;

Miller v. *Osterlund*, 154 Minn. 495, 191 N. W. 919;

Meyer v. *Richards*, 163 U. S. 385, 41 L. Ed. 119, 16 S. Ct. 1148;

Shippen v. *Bowen*, 122 U. S. 575, 30 L. Ed. 1172.

As to recovery on this ground limitations ran from date of discovery of the fraud. Mason's, Minn. 1927 Stats., Sec. 9194-6, provides that such an action for fraud is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.".

3. Appellant's sale of the securities to plaintiff "at market" implied a sale at a price unaffected by its own manipulation of the market.

Otis & Co. v. *S. E. C.* (C. C. A. 6), 106 Fed. (2d) 579, at 583.

Limitations as to recovery on this ground also ran from date of discovery of appellant's fraud.

4. Appellant's wilful concealment of (a) non-registration of its stock, (b) non-licensing of its salesmen, and (c) its pool operations and market manipulations, constituted actionable deceit.

Strong v. *Repide*, 213 U. S. 419, 53 L. Ed. 853, 23 S. Ct. 521;

Stewart v. *Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. Ed. 439, 9 S. Ct. 101.

Limitations as to recovery on this ground also ran from date of discovery of appellant's fraud.

The complaint, in alleging a single cause of action, based on several grounds, conformed to the well settled rule of practice and procedure enunciated in

Tuder v. *Oregon Short Line Ry. Co.*, 131 Minn. 317, 319, 155 N. W. 200,

as follows:

> "He (plaintiff) has only one cause of action, and must present, in this suit, all the grounds upon which he relies for a recovery. He cannot present a part of such grounds in this suit, and, if he fails to establish them, present other grounds in a new suit."

History of Proceedings.

The case was tried before Honorable W. W. Bardwell, of Hennepin County District Court, between May 9, 1939,

and June 10, 1939. The record on appeal consisted of two volumes totaling 1223 pages. There were 117 exhibits.

While the *Donaldson* case was pending in the state court, another test case was decided against appellant by the U. S. District Court for Minnesota, in November 1938, on all of the foregoing grounds of recovery.

Vogel v. *Chase Securities Corporation* (not reported).

A companion case in the same court, was decided against appellant on November 4, 1938, on similar grounds.

Stern v. *National City Company* (D. C., Minn.) 25 Fed. Supp. 948.

On March 18, 1940, the Circuit Court of Appeals for the 8th Circuit decided the *Stern* and *Vogel* cases, and held that limitations were tolled.

City of New York v. *Stern* (C. C. A. 8), 110 Fed. (2d) 601;

Chase Securities Corporation v. *Vogel* (C. C. A. 8), 110 Fed. (2d) 607.[2]

The Circuit Court of Appeals limited its decision in these cases to the first of the above grounds of recovery, and held that the Statute of Limitations was tolled under Mason's, Minn. 1927 Stats., Sec. 9200, after withdrawal by a foreign corporation from Minnesota, although it had in force during its absence a consent to service of process through a state official. It did not find it necessary to decide any of the other issues.

Thereafter, on April 18, 1940, Honorable W. W. Bardwell made and filed Findings of Fact, Conclusions of Law, and Order for Judgment, sustaining recovery in favor of plaintiff on the single ground of appellant's violation of the

[2] Opinions of the Circuit Court of Appeals in the Stern and Vogel cases are hereto attached as Appendix "A".

Securities Act and the tolling of the Statute of Limitations, expressly stating that

> "The court finds it unnecessary to make findings on the claims of actual fraud, implied fraud, and fraud by suppression of material facts, presented by the complaint, inasmuch as the court has allowed recovery on a ground independent of said claims."
>
> (Findings of Fact, April 18, 1940, par. XXVI)

Appellant appealed to the Supreme Court of Minnesota from an order dated May 6, 1940, denying its motion for amended findings, or, in the alternative, for a new trial, and also from a judgment entered in favor of plaintiff on June 18, 1940. The only issue involved in said appeal was the construction of the tolling statute (Mason's Minn. Stats. 1927, Sec. 9200).

On January 10, 1941, the Supreme Court of Minnesota, by a 4 to 3 majority, held contrary to the Circuit Court of Appeals for the 8th Circuit in the *Stern* and *Vogel* cases, *supra*, and reversed said order and judgment. It said:

> "Our decision in a companion case, Pomeroy v. National City Co. 209 Minn. 155, 296 N. W. 513, is decisive of the only question presented by this appeal and requires reversal of the judgment under review.
>
> This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."
>
> *Donaldson v. Chase Securities Corporation*, 209 Minn. 165, at page 166, 296 N. W. 518.

Thereafter, on April 9, 1941, plaintiff moved the trial court for an order supplementing and correcting the Findings of Fact made on April 18, 1940, so as to secure determination of the issues of fraud by implied representation,

fraud by manipulation of the market, and fraud by concealment.

On April 27, 1941, the Minnesota Legislature enacted a comprehensive revision of the Securities Law (Laws of Minnesota, 1941, Ch. 547, hereinafter referred to as: "1941 Laws"), including for the first time in section 18 thereof, a special limitations section, as follows:

> "No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective . . . ."

On May 16, 1941, plaintiff moved for supplemental findings of fact and conclusions of law, with respect to applicability of the 1941 Law.

On May 14, 1941, appellant filed its motion to amend the Findings of Fact dated April 18, 1940.

Thereafter, and on June 27, 1942, Honorable W. W. Bardwell made and filed Findings of Fact, Conclusions of Law, and Order for Judgment in favor of plaintiff on all of her asserted grounds of recovery.[3]

---

[3] Findings of Fact, Conclusions of Law and Order for Judgment, dated June 27, 1942, are attached hereto as Appendix "B".

With respect to the first ground of recovery, the trial court held that plaintiff was entitled to recover in tort on the ground of illegal sale by appellant, and that the bar of limitations with respect thereto was lifted by the 1941 Law (Appendix "B", par. XXXII).

With respect to the second ground of recovery, the trial court held that the sale and delivery of the securities by appellant to plaintiff constituted an implied representation that it had complied with the Securities Act by registering its securities and licensing its agents, and that its stock was legally sold to plaintiff (Appendix "B", pars. XV, XIX, XX and XXI).

With respect to scienter, the court found that appellant knew and was familiar with the requirements of the Securities law and wilfully failed to register its Chase units for sale in Minnesota. It further found that for a considerable time prior to August 8, 1929, appellant was engaged, in association with Dominick and Dominick, and others, in pool operations by means of which the market price of Chase units was manipulated and controlled, and whereby appellant and its associates were enabled to unload their holdings of Chase units upon the public at great profits to themselves, and whereby the public was attracted to the market by false and deceptive appearance of demand and supply, and was induced to purchase said units at prices which were not arrived at by lawful and legitimate factors of supply and demand in the securities market (Appendix "B", pars. XIX, XXIII to XXXI, inclusive). The trial court further found that appellant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal the facts with respect to its pooling operations which constituted information relative to securities necessary for the Commission to enable it to determine whether said securities should be registered, and properly to pass upon an application for

registration, and that with such knowledge appellant attempted to evade the law requiring the Chase units to be registered (Appendix "B", par. XIX).

With respect to limitations, the trial court found that plaintiff did not discover appellant's fraud until October 1, 1937, shortly prior to the commencement of the action, and that the action was seasonably commenced (Appendix "B", pars. XXXII and XXXIII).

With respect to the third ground of recovery, the trial court held that appellant sold the securities to plaintiff "at market" and that it represented to plaintiff that there was a free, uncontrolled and unmanipulated market for said Chase units, and that the price thereof was determined by lawful and legitimate factors of supply and demand, free from any manipulation or control by appellant, all of which representations were false (Appendix "B", pars. XVI, XIX, XXII to XXXII, inclusive). With respect to this ground of recovery, the court likewise found that the limitations ran from date of discovery (Appendix "B", par. XXXII).

With respect to the fourth ground of recovery, the trial court held that appellant wilfully concealed and suppressed the true facts with respect to nonregistration of its stock, non-licensing of its salesmen, and its pooling operations and market manipulations, and that with respect to such ground of recovery, limitations ran from date of discovery (Appendix "B", pars. XVII, XVIII and XXXII).

On September 8, 1942, appellant filed a motion for amended findings or, in the alternative, for a new trial, which was denied by order dated November 18, 1942. On November 25, 1942, judgment was entered in favor of plaintiff and against appellant in District Court of Hennepin County, Minnesota.

On November 25, 1942, appellant appealed for the second time to the Supreme Court of Minnesota from said

order denying its motion for amended findings or for a new trial, dated November 18, 1942, and from the judgment dated November 25, 1942.

On December 31, 1943, the Supreme Court of Minnesota unanimously affirmed the order and judgment of the trial court (*Donaldson, et al.* v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1), but limited its decision to the first ground of recovery, holding that

1) Appellant's sale of the securities to plaintiff was, unquestionably in violation of law;

2) The action was in tort (and not upon a "liability created by statute"), and plaintiff was entitled to recover the purchase price unless barred by limitations;

3) The Legislature, in enacting the 1941 Law intended for a period of one year from its effective date, to lift the bar as to causes of action which accrued more than five years prior to said effective date;

4) The Legislature did not violate the state or federal constitutions by lifting the bar of limitations as applied to this case;

5) The 1941 Law was applicable to this case which was a pending case at the time said law was enacted.

A companion case, *Pomeroy* v. *National City Company*, was decided in accordance with the *Donaldson* case on the same day (Minn.) 13 N. W. (2d) 6).

Petition for Re-argument was unanimously denied in both cases on February 23, 1944. There has been no appeal to this court by the National City Company in the *Pomeroy* case.

The case now comes before this court on appeal from the final judgment of the Supreme Court of Minnesota. Appellees[4] assert that no federal questions are presented.

[4] During the pendency of the Appeal to the Minnesota Supreme Court, the original plaintiff died, and Appellees, executors of her estate, were substituted as respondents therein.

Argument in Opposition to Jurisdiction.

Appellees aver that this Honorable Court is without jurisdiction for the reason that none of the Assignments of Error presents a federal question.

I.

CLAIM THAT ADHERENCE TO CAMPBELL v. HOLT DENIES APPELLANT DUE PROCESS OF LAW (ASSIGNMENTS OF ERROR 1 AND 3).

At the outset, it is important to point out that, as said in *Graham* v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186,

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

There is no question here as to appellant's liability (*Commissioner of Securities* v. *Chase Securities Corporation*, 298 Mass. 285, 10 N. E. (2d) 472; appeal dismissed 302 U. S. 660, 82 L. Ed. 510, 58 S. Ct. 476.) Further, at the time the 1941 Law was enacted, appellant was subject to liability upon several other asserted and well supported grounds of recovery.

See: *Mary Pickford* v. *Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102.

a) Claim that Due Process was denied because state court applied *Campbell v. Holt* rather than *Danzer & Co.* v. *Gulf & S. I. R. Co.*

It is first claimed that the Minnesota Supreme Court denied appellant due process because it failed to apply the principle of the *Danzer* case (268 U. S. 633, 69 L. Ed. 1126, 45 S. Ct. 612). It was there held that a legislature cannot lift the bar as to a cause of action which was limited by

the very statute which created it. In this connection appellant urges that

1. Plaintiff's first ground of recovery is "upon a liability created by statute".
2. Plaintiff's first ground of recovery must be regarded as though limited by the statute that created it, even though it is governed by the general statute of limitations.

This contention of lack of due process is completely without merit because

1. This court has repeatedly held that it will accept as binding the construction and interpretation placed upon a state statute by the State Supreme Court.

Roe v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259, 49 S. Ct. 60;

Cargill Co. v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423;

Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 S. Ct. 136;

St. Louis I. M. & S. R. Co. v. *Paul*, 173 U. S. 404, 43 L. Ed. 746, at 748, 19 S. Ct. 419;

Missouri Pacific Railway Co. v. *Nebraska*, 164 U. S. 403, at 414, 41 L. Ed. 489, at 494, 17 S. Ct. 130;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970, at 980, 10 S. Ct. 462.

2. In its opinion (13 N. W. (2d) 1, 3), the Minnesota Supreme Court rejected appellant's claim that plaintiff's first ground of recovery was upon "a liability created by statute", and said:

> "'The action is in tort', citing *Drees* v. *Minnesota Petroleum Co.*, 189 Minn. 608, 611, 250 N. W. 563, 565."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.), 13 N. W. (2d) 1,3.

That construction is binding on this court.

3. Previous decisions of the Minnesota Supreme Court completely refute appellant's contentions. A cause of action for recovery of damages on account of the illegal sale of securities has been held governed by the general statute of limitations which has been in force ever since Minnesota was a state.

Burzinski v. *Kinyon Investment Co.*, 192 Minn. 335, 256 N. W. 233.

The first Securities Act was enacted in 1917, Laws of Minnesota 1917, Chap. 429. No special limitation provision was contained in the Securities Act until the enactment of the 1941 Law.

The former Securities Act did not expressly confer any right of action, but because it was enacted for the benefit of a class, it was held to give rise to a common law right of action in tort against a seller violating its provisions, although the Act did not expressly so provide.

Vercellini v. *U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672;

Webster v. *U. S. I. Realty Co.*, 170 Minn. 360, 212 N. W. 806;

Drees v. *Minnesota Petroleum Co. supra.*

Such action is not "upon a liability created by statute."

Olesen v. *Retzlaff*, 184 Minn. 624, at 632, 238 N. W. 12, 239 N. W. 672;

Osborne v. *McMasters*, 40 Minn. 103, 41 N. W. 543, 12 A. S. R. 698;

Metropolitan R. R. Co. v. *District of Columbia*, 132 U. S. 1, 12, 33 L. Ed. 231, 10 S. Ct. 19.

The general statute of limitations has always been construed by the Minnesota Supreme Court as affecting the remedy only.

In re Daniels, 208 Minn. 420, 294 N. W. 465, where the court said:

> "A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced; hence it relates to the remedy only."

Accord:

Dunnell's Minn. Digest, Secs. 1546, 1617, 5587;
Kocizek v. Brigham, 169 Minn. 57, 210 N. W. 622;
U. S. v. Whited & Wheless, 246 U. S. 552, 62 L. Ed. 879, 38 S. Ct. 367.

The difference between *Campbell* v. *Holt* and the *Danzer* case was recognized by the Minnesota Supreme Court.

Kanellos v. G. N. Ry. Co. 151 Minn. 157, 186 N. W. 389:

> "But we are unable to concur in the contention that the limitation fixed by the liability act should be construed as an ordinary statute of limitations. It has not received that construction in the Federal courts, at least no decision from those courts so deciding has been called to our attention. The case of Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, is not such a case, for there an ordinary limitation statute was involved, and not one like that in the case at bar."

Indeed, in the Danzer case, this court recognized the same distinction when it said concerning *Campbell* v. *Holt*:

> "The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional." The opinion distinguishes the case.

> from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only."

As to the point that the Danzer case should have been applied the Supreme Court said in this case:

> "The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute, such as Lord Campbell's Act, the Interstate Commerce Act, 49 U. S. C. A., Sec. 1 et seq., or the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., and the same statute prescribes a period of limitation within which the cause must be brought. The weight of authority in such cases is that the period of limitation is a part of the cause of action, and if it is not brought within the time specified it may not be revived. Negaubauer v. Great N. Ry. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150; Kannellos v. Great N. R. Co., 151 Minn. 157, 186 N. W. 389; Danzer & Co., Inc. v. Gulf & S. I. R. Co., 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1, 5.

In contending that the Minnesota Supreme Court should have here applied the principle of the Danzer case, appellant is merely quarrelling with the state court's construction and interpretation of its own statutes. As already appears, the decision of the state court as to the nature of a cause of action for violation of a Securities Act which did not expressly confer a right of action and which contained no limitations provision of its own but was governed by the general statute of limitations was obviously right and consistent with a long line of previous holdings. It comes to this then, the Minnesota Supreme Court has said that the remedy only was affected. Appellant, by this ap-

peal is asking this court to hold that the State Supreme Court erred in interpreting its own statutes.

But, even if the State Supreme Court were wrong, Appellant cannot complain that such error denied it any constitutional rights because this court, in judging of constitutionality, will accept the construction placed by the state court upon its own statutes. Recently, Justices Douglas and Black in

Demorest v. *City Bank Farmers Trust Co.*, 88 L. Ed. 340, at page 347,

expressed this thought as follows:

> "That is a question of New York law on which the New York court has the final say. It is none of our business whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. Sauer v. New York, 206 U. S. 536, 545-548, 51 L. Ed. 1176, 1181, 1182, 27 S. Ct. 686."

There was no denial of due process in the court's holding that the *Danzer* case had no application:

> b) Appellant next contends that if the *Danzer* case was not applicable, then the Minnesota Supreme Court denied it due process by following rather than rejecting *Campbell* v. *Holt*, a decision of this court which has stood as law for sixty years.

The proposition that a legislature has a perfect right to restore a remedy already barred, because it will not take away any vested right of property, is fully developed by Mr. Justice Miller in *Campbell* v. *Holt*, supra, and his analysis need not be here repeated.

Judge Clark recently in *Pittsburgh Can Co.* v. *U. S.* (C. C. A. 3), 113 Fed. (2d) 821, gave this terse affirmation of the doctrine:

> "The flaw seems to lie in a straining in favor of 'law Latin' and again plain English. This straining pro-

ceeds, as we have indicated, from some notion of hardship. That notion of hardship proceeds in its turn from a sentimental but illogical analysis of the purposes of statutes of limitation. Those statutes confer no vested rights. They are *ex gratia* to the individual to protect him from perjury and they benefit the public by accelerating litigation. There is no unfairness in retrospectively removing something that was only a shield."

The Supreme Court of Minnesota said with respect to this point:

"In Campbell v. Holt, the Supreme Court held that a statute which applied merely to the remedy did not vest such a right in the defendant that the Legislature or, in that case, the Constitution of the state of Texas, could not lift the bar of the limitation and thereby revive the cause. Strictly speaking, it is not a revival of the cause in the technical sense of that term as used in connection with abatement but merely a lifting of the bar against the remedy.

"In Kipp v. Johnson, 31 Minn. 360, 363, 17 N. W. 957, 959, this court, speaking through Mr. Justice Mitchell, said, 'No man has a vested right to a mere remedy, or in an exemption from it.' In that case the distinction subsequently recognized in Campbell v. Holt was stated with approval.' This court said (31 Minn. 362, 17 N. W. 958): 'But what are often indiscriminately called statutes of limitation consist of two distinct classes: *First*, statutes of limitation, properly so called, where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but *extinguishes the right* and vests a perfect title in the adverse holder. Stocker v. Berry, 1 Ld. Raym. 741; Leffingwell v. Warren, 2 Black (599), 605 (17 L. Ed. 261); Bull. N. P. 103. The *second* class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of cer-

tain forms of action that — a means of the acquisition of title. In such a case the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property.'

"It is true that in Kipp *v.* Johnson the court considered that the plaintiff had another remedy that had not been barred by the statute which had been repealed, but we regard the court's statement of the law as quoted above as announcing the sound and logical rule even if there be no other remedy. In House *v.* Carr, 185 N. Y. 453, 78 N. E. 171, 172, 6 L. R. A., N. S., 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185, the court said:

> 'It must be borne in mind that the statute of limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the Legislature to repeal the Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation.'

"We do not follow the logic of such cases as Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871, and State *v.* Chicago & N. W. Ry. Co., 132 Wis. 345, 112 N. W. 515, or the Illinois cases which regard the running of the statute as paying the debt.

"We have been cited to no case where we have drawn any distinction between our interpretation of the due process clause in our State Constitution and the interpretation given to the due process clause of the Federal Constitution by the Supreme Court of the United States. We do not find that Campbell v. Holt has been reversed or reconsidered and we regard it as sound law; and certainly, so far as the Federal Constitution is concerned, it is binding on this court until reversed by the Supreme Court.

"Statutes of limitation which only bar the recovery of a debt or damage for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates. The bar of such statutes

may be lifted without violating the due process clauses of either the State or Federal Constitutions. See, also, McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609; Orman *v.* Van Arsdell, 12 N. M. 344, 78 P. 48, 67 L. R. A. 438."

Donaldson v. *Chase Securities Corp.* (Minn.) 13 N. W. (2d) 1, 4.

It is claimed that a federal question exists because some state courts have rejected *Campbell* v. *Holt*. At least nine (and not three as claimed by appellant) jurisdictions have followed it unqualifiedly.

Conn.—*Gilbert* v. *Selleck* (1919) 93 Conn. 412, 106 At. 439;

Ind.—*Jackson Hill Coal Co.* v. *Commissioners* (1914) 181 Ind. 335, 104 N. E. 497; *Hillyer* v. *Boyd* (1941) 218 Ind. 238, 32 N. E. (2d) 93;

Mich.—*Evans Products Co.* v. *Fry* (1943) 307 Mich. 506, 12 N. W. (2d) 448;

Minn.—*Donaldson* v. *Chase Securities Corporation* (1943) 216 Minn. —, 13 N. W. (2d) 1; *Pomeroy* v. *National City Co.*, 216 Minn. —, 13 N. W. (2d) 6;

Mont.—*Berkin* v. *Healy* (1916) 52 Mont. 398, 158 Pac. 1020;

N. Mex.—*Orman* v. *Van Arsdell* (1904) 12 N. M. 344, 78 Pac. 48;

Pa.—*Bates* v. *Cullum* (1896) 177 Pennsylvania 633, 35 Atl. 861;

Wash.—*Herr* v. *Schwager* (1927), 145 Wash. 101, 258 Pac. 1039;

W. Va.—*McEldowney* v. *Wyatt* (1898) 44 W. V. 711, 30 S. E. 239, 45 L. R. A. 609.

The Federal courts have never departed from it.

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600;

Graham v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Pittsburgh Can Co. v. *U. S.* (C. C. A. 3) 113 Fed. (2d) 821;

City of Sour Lake v. *Branch* (C. C. A. 5) 6 Fed. (2d) 357;

Huntley v. *Gile*, 32 Fed. (2d) 859;

Wright & Taylor v. *Lucas* (D. C.) 34 Fed. (2d) 328, affirmed C. C. A. 6, 45 Fed. (2d) 75; affirmed 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Oak Worsted Mills v. *U. S.*, 36 Fed. (2d) 529;

Regla Coal Co. v. *Bowers* (D. C.) 37 Fed. (2d) 373, affirmed in *Daniel Reeves, Inc.* v. *Anderson* (C. C. A. 2), 42 Fed. (2d) 679, affirmed 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

U. S. v. *E. Hogshire Son & Co. Inc.*, 37 Fed. (2d) 239;

Rockland & Rockport Lime Corp. v. *Ham* (D. C.) 38 Fed. (2d) 239;

North American Creamery Co. v. *Willcutts* (D. C.) 38 Fed. (2d) 483, Appeal dismissed (C. C. A. 8) 49 Fed. (2d) 1082;

Wyman Partride Co. v. *U. S.* (D. C.) 41 Fed. (2d) 886;

American Glue Co. v. *U. S.*, (D. C.) 42 Fed. (2d) 235;

Imhoff-Berg Silk Dyeing Co. v. *U. S.*, 43 Fed. (2d) 836;

United Thacker Coal Co. v. *Commissioner* (C. C. A. 1), 46 Fed. (2d) 231;

Simmons Mfg. Co. v. *Routzahn* (C. C. A. 6) 62 Fed. (2d) 947, Cert. denied 289 U. S. 751, 77 L. Ed. 1496, 53 S. Ct. 695;

Pratt & Litchworth v. *U. S.* (D. C.) 1 Fed. Supp. 745;

Daube v. *U. S.*, 1 Fed. Supp. 772;

McKay v. *Bradley*, 26 App. D. C. 449;

Joy Floral Co. v. *Commissioner*, 7 B. T. A. 800;

F. A. Gillespie v. *Commissioner*, 20 B. T. A. 1068.

Upon examination, it appears that some of the jurisdictions claimed by appellant to have rejected *Campbell* v. *Holt* have not done so or have only indicated dissent by way of dictum.[5]

Some courts sustain retroactive statutes which lift the bar of limitations, in situations calling for special and equitable treatment without giving unqualified approval to *Campbell* v. *Holt*.[6]

But these New York and Massachusetts decisions, even though giving limited approval to *Campbell* v. *Holt* necessarily depend upon the existence of some power in the legislature consistent with the due process clause to lift the bar of limitations.

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[5] Appellant claims that Michigan in *Lohrstorfer* v. *Lohrstorfer* (1905), 140 Mich. 551, 104 N. W. 142, has rejected *Campbell* v. *Holt*. The case does not cite *Campbell* v. *Holt*, and certainly the decision is not based on the power of the legislature to lift the bar of limitations. Indeed, on December 29, 1943, the Supreme Court of Michigan, in *Evans Products Co.* v. *Fry*, 307 Mich. 506, 12 N. W. (2d) 448, strongly relies on *Campbell* v. *Holt*, and quotes liberally therefrom.

Siefkin v. *Siefkin*, 150 Kans. 396, 92 Pac. (2d) 1005, was decided on the ground that the legislature did not intend to lift the bar retroactively, and consequently, any statements contained therein with respect to *Campbell* v. *Holt* are dictum.

Likewise *Hickory Co.* v. *Forester*, 204 N. C. 163, 167 S. E. 691, did not squarely decide the point and is dictum.

Eingartner v. *Illinois Steel Co.*, 103 Wis. 373, 79 N.W. 443, represents the view that limitations bars the right as well as the remedy, a theory which has found little acceptance in the courts.

[6] *Robinson* v. *Robins Dry Dock and Repair Co.*, 238 N. Y. 271; 144 N. E. 579, 36 A. L. R. 1310; Error dismissed 271 U. S. 649, 46 S. Ct. 636, 70 L. Ed. 1131.

Cf. however, *People ex rel. Equitable Holding Corporation* v. *Graves* (1942), 33 N. Y. Supp. (2d) 476, which cited *Campbell* v. *Holt* with approval, and said:

"No right is destroyed when the law restores a remedy which had been lost."

Danforth v. *Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 A. S. R. 495.

Dunbar v. *Boston & P. R. Corp.*, 181 Mass. 383, 63 N. E. 916.

Mulligan v. *Hilton* (Mass.), 24 N. E. (2d) 676, 133 A. L. R. 376.

Able jurists have in recent cases stated that the majority view in *Campbell* v. *Holt* is based upon sounder reasoning. Thus, in *Herr* v. *Schwager*, *supra*, it was said:

> "It seems to us after reading all the cases which have decided the question that the better reasoning is with the majority view of the Federal Supreme Court. If, as all courts hold, a statute of limitation operates upon the remedy only and does not destroy the obligation, we think that by the running of the statute a debtor does not acquire a vested right not to pay a debt which at no time has been destroyed."

On December 29, 1943, just two days before the Minnesota Supreme Court rendered its opinion in this case, the Supreme Court of Michigan decided *Evans Products Co.* v. *Fry* (1943) 307 Mich. 506, 12 N.W. (2d) 448, which quoted at length from and approved the majority holding in *Campbell* v. *Holt*. The Michigan Supreme Court sustained its recently enacted escheat law which required corporations holding unclaimed credits to turn them over to the State to be administered under its escheat procedure, even though the statute of limitations may have long since run on such credits. It was contended that such corporations actually had vested rights in such barred credits, and that the State could not constitutionally disturb them. However, the statute was sustained.

The whole problem of lifting the bar as to barred remedies is one of legislative wisdom and judgment in dealing with remedies to determine what situations appropriately call for the exercise of the power to lift the bar. It is not a question of due process.

c) 1941 Law viewed as lifting the bar of limitations as to one remedy, when several other unbarred remedies remain.

Analysis of the Complaint, and of the Findings of Fact, dated June 27, 1942, Appendix "B", discloses that plaintiff

asserted four separate grounds of recovery to support her single cause of action. On the first appeal the Supreme Court in this case, 209 Minn. 165, 296 N.W. 518, reversed the order and judgment as to the issue of tolling only, and with respect to other issues, the decision was "without prejudice to them or the result." The 1941 Law, by cataloguing the various grounds of recovery, is a legislative recognition of the prior existence of the several grounds of recovery asserted by plaintiff.

Plaintiff's cause of action was not barred by the first *Donaldson* decision. All that was there held was that the lower court erroneously construed the tolling statute. That decision became the "law of the case" on the issue of tolling, but the action remained pending as to all other issues. The case was sent back for further proceedings.

The barring of one remedy or ground of recovery did not "smother the right to pursue the others."

U. S. v. *Whited & Wheless*, 246 U. S. 552, 62 L. Ed. 879; 38 S. Ct. 367;

Jackson v. *Holbrook*, 36 Minn. 494, 32 N.W. 854, 1 A.S.R. 683;

34 *Am. Jur. Limitations of Actions*, Sec. 403, p. 316.

Even in those jurisdictions which have refused to follow *Campbell* v. *Holt*, it has been held that there is no constitutional objection to lifting the bar as to a barred remedy at a time when other unbarred remedies still exist. As stated by Mr. Justice Mitchell in *Kipp* v. *Johnson*, 31 Minn. 360, the lifting of the bar in this situation "would not be to divest him of any vested rights or property, but simply to increase the remedies or forms of action in which such rights might be tested."

Cf. *Power* v. *Telford*, 60 Miss. 195 (where the court held that the legislature might revive a barred remedy

at a time when an unbarred remedy was still outstanding),
and *Davis* v. *Minor* (Miss.), 1 How. 183, 28 A. Dec. 325.
See also: *Alvord* v. *Little*, 16 Fla. 158;
U. S. v. *Whited & Wheless*, 246 U. S. 552, 62 L. Ed. 879; 38 S. Ct. 367.

d) Viewed as lifting the bar of limitations in a special situation calling for special and equitable treatment.

After the decision on the first appeal, plaintiff still had three grounds of recovery with respect to which limitations ran from date of discovery.

Mason's Minn. 1927 Stats., Sec. 9191-6.

Prior to the enactment of the 1941 Law, the Securities Act (Mason's Minn. 1927 Stats., sec. 3996-24) provided that

> "Nothing in this Act shall limit statutory or common law right of any person to bring action in any court for any act involved in the sale of securities, or the right of the state to punish any person for any violation of any law."

This section was superseded by Section 18 of the 1941 Law. By its terms, Section 18 provides for a six-year limitation period from date of delivery of the securities, regardless of whether the ground of recovery is a violation of a provision of the Securities Act, or a provision of a registration thereunder, or is based upon a "representation with respect to the registration or non-registration of the security claimed to be implied from any such sale," or upon failure to disclose that the sale was made in violation of law or of a provision for registration under such law.

Applied to all claims, whether pending or unasserted, discovered or undiscovered, the result of the 1941 statute without the proviso would have been to deprive plaintiff and

others similarly situated of the right to have the limitations period run from date of discovery. As an obvious adjustment for this deprivation, and, in the light of the background of the litigation, which is of public record in the State and Federal Courts, the Legislature, as to causes of action which accrued more than five years prior to the effective date of the new statute granted a one-year period following such effective date within which such actions might be brought. The phrase "such action" obviously included an action brought for recovery on any of the grounds enumerated in the statute. The Supreme Court held that the legislature had power, in connection with the retrospective application of this new and special statute of limitations, to make provision for final adjustment and repose of pending claims involving, among other compensating features, the lifting of the bar as to a ground of recovery affected by the former general statute of limitations.

The Supreme Court of Minnesota had this in mind when it said in its opinion in this case:

> "Causes of action for such violations were not distinguished from those in deceit which under the prior law may or may not have accrued more than six years prior to the effective date of the act. • • • We hold that the legislature did not violate the constitution by lifting the bar of the statute as applied to this case."

Courts have sustained statutes lifting the bar in special situations calling for special and equitable treatment, without giving unqualified approval to the doctrine of *Campbell v. Holt*.

Thus, in *Robinson v. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310, error dismissed 271 U. S. 649, 46 S. C. 636, 70 L. Ed. 1131, the Legislature removed the bar of the statute of limitations applicable to death from wrongful act. Plaintiff had sought relief under

the compensation act applicable in the case of admiralty jurisdiction, at a time when his action seemed well taken under prevailing statutory interpretations. Later the Supreme Court of the United States overruled the statutory interpretations and held them inapplicable. He was then relegated to relief by action under the wrongful death statute; but in the meantime the statutory period had elapsed. The Legislature in this situation enacted a special revivor statute which enabled plaintiff to commence an action after the time limited by general or special laws, "and within one year after this act goes into effect." The court said:

> "The statute was enacted solely for the purpose of enabling a party to bring an action when, without such statute, lapse of time would furnish a complete defense. It results, therefore, in depriving the defendant of a valid defense."

The cases of *Danforth* v. *Groton Water Company*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495, and *Dunbar* v. *Boston & P. R. Corp.*, 181 Mass. 383, 63 N. E. 916, both hold without committing themselves to complete adherence to *Campbell* v. *Holt*, that in situations requiring special and equitable treatment the Legislature does have the power to lift the bar as to an outlawed remedy.

In the *Danforth* case, without committing himself to an unqualified approval of *Campbell* v. *Holt*, Chief Justice Holmes said:

> "But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

In *Dunbar* v. *Boston & P. R. Corp.*, *supra*, the court said:

> "That the constitutional provisions allow a certain limited degree of latitude in dealing with cases where remedies have been extinguished by lapse of time when the seeming infraction of right is not very great and when justice requires relief. It is unnecessary to go so far as Campbell *v.* Holt."

Mulligan v. *Hilton* (Mass.) 24 N. E. (2d) 676, follows the *Danforth* and *Dunbar* cases and is another instance where the power of the Legislature to lift the bar of limitations was upheld in a special situation.

In view of the availability of plaintiff's common law remedies at the time of the enactment of the 1941 Law, and in view of the general plan of adjustment and repose adopted, the lifting of the bar as to the first ground of recovery was valid. Even those authorities which have refused to follow *Campbell v. Holt*, or have refused to give it unqualified approval, are not opposed to this conclusion.

Campbell v. *Holt* applied to a statute so construed, does not deprive appellant of any rights without due process of law.

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600;

Carpenter v. *Wabash Railway Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416;

Graham v. *Goodcell*, 282 U. S. 409, 75 L. Ed. 415, 51 S. Ct. 186;

Rafferty v. *Smith B. & Co.*, 252 U. S. 226, 66 L. Ed. 208, 42 S. Ct. 71;

U. S. v. *Heinszen*, 206 U. S. 370, 51 L. Ed. 1098, 27 S. Ct. 742.

(c) Important considerations of public policy require adherence to *Campbell* v. *Holt*.

1. The contention that this Court should now announce that a general statute of limitations operates not only to bar the remedy but to destroy the right, would have far-reaching effects in many fields of settled law. For many years it has been the unquestioned law that a general statute of limitations operates on the remedy only, and is the basis of the following well accepted doctrines:

(a) A new promise revives the remedy on a barred indebtedness.

(b) A partial payment revives the remedy on a barred indebtedness.

(c) A debt barred in the state where it accrued can still be enforced in a forum where the limitation period is longer.

(d) The bar of one remedy does not prevent the assertion of the cause of action on another remedy.

(e) Although a mortgage indebtedness is barred, a mortgage may still be foreclosed.

2. The doctrine of *Campbell v. Holt* is important in the protection of public revenues against the inequitable assertion of limitations to prevent collection of taxes.

3. The power of the Legislature to remove a statutory bar which has conferred an immunity is necessary in many instances to prevent injustice and maladministration.

4. The question of retrospective change of remedies is basicly one of legislative discretion and not of due process of law. Legislatures are not to be distrusted. "The possible abuse of a power is not an argument against its existence."

Lottery cases (*Champion v. Ames*) 188 U. S. 321, 363, 47 L. Ed. 492, 504, 23 S. Ct. 321;

Arizona v. California, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522.

Sixty years of experience under *Campbell* v. *Holt* has failed to demonstrate irresponsible application of this discretionary legislative policy.

II.

Claim That 1941 Law Denies Due Process Because Appellant Had "Vested Right" in Judgment of Reversal on First Appeal (Assignment of Error 2).

By this contention, Appellant urges that even if *Campbell* v. *Holt* is the law and the Legislature does possess the power to lift the bar as to a barred remedy, that could not be done in this case because appellant had acquired "vested rights" by virtue of the reversal on the first appeal. In this connection, appellant also claims that the Legislature reversed the decision of the Minnesota Supreme Court on the first appeal.

The contentions are based upon six misconceptions:

1. Appellant misconceives the effect of the 1941 Law. The State court on the first appeal merely construed the tolling statute. The rule of law laid down remains unchanged and was not affected by the 1941 Law. There was no reversal by legislative act.

2. Appellant misconceives the effect of a reversal by an appellate court accompanied by a remand for further proceedings. The result is merely to establish the law of the case on one limited issue. It is not even *res judicata*. In that situation, there is no final determination, and the case goes back to the trial court. Upon remand the case stands in the court below the same as if no trial had been had.

Hickey v. *Johnson* (C. C. A. 8) 9 Fed. (2d) 498, where the court said:

> "The Appellate Court passed upon no issues except those presented in the record on appeal. Upon remand,

the case stands in the court below the same as if no trial had been had."

City of Aurora v. *West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42, where the court said, with respect to a judgment reversed and remanded for further proceedings:

> "Certainly the reversal of the judgment * * * is not conclusive evidence that the plaintiff may not ultimately recover. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."
>
> See: 34 *C. J.*, sec. 1492, p. 774; sec. 1309, p. 899.

On the first appeal, the Supreme Court of Minnesota said:

> "This record indicates the presence of issues other than that of the tolling of the statute of limitations. If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result."

3. Appellant confuses the doctrine of the "law of the case" with "res judicata." The proposition that the statute was not tolled by appellant's absence became the law of the case. Even so, appellant did not have any "vested right" in the law of the case. Even this rule of law was subject to change on the second appeal if the Supreme Court of Minnesota had seen fit to do so.

Matthews v. *Matthews*, 154 N. Y. 288, 48 N. E. 531;
Messinger v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152, 32 S. Ct. 730;
King v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396, 30 S. Ct. 225;
Great Western Telegraph Co. v. *Burnham*, 162 U. S. 339, 40 L. Ed. 991, 16 S. Ct. 850.

Even were we to assume that plaintiff had but one ground of recovery, the decision on the first appeal did not destroy

that ground or right of recovery. This can best be illustrated by a hypothetical situation. Let us assume that the period of limitations fixed by Minnesota Statutes for actions on contracts was ten years which had not run, and, for tort actions six years which had run, and that plaintiff had urged that her action was one on contract and therefore not barred. In such a situation a decision of the appellate court construing the action to be one of tort to which the six year limitation applied, would leave plaintiff in the category of any other claimant or creditor, whose cause of action or debt existed but whose remedy was gone. The appellate court's decision would not in any sense be an adjudication on the merits of plaintiff's claim, and until the case was remanded to the lower court, the correct law applied, and a judgment entered in that court, there would be no adjudication on the merits. Until entry of such final judgment the action would still be pending, subject to the right of the legislature to extend the period of limitations.

4. Appellant misconceives the nature of the decision in the first appeal. It never did acquire any "vested right", because it never obtained a final judgment in its favor on the merits. All it obtained was a judgment for costs on the first appeal. Without a final adjudication in its favor, the doctrine of *res judicata* could have no application.

City of Aurora v. *West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42.

5. Appellant overlooks the fact that the action was still pending when the 1941 Law took effect.

In Minnesota, it is settled that an action "is deemed still pending until its final determination."

Seeger v. *Young*, 127 Minn. 416, at page 419, 149 N. W. 735;

H. L. Spencer Co. v. *Koell*, 91 Minn. 226, 97 N. W. 974.

The authorities uniformly hold that an action is deemed pending until it is finally disposed of, and so long as further judicial action may be required in the suit.

Montoya v. *Gonzales*, 232 U. S. 375, 58 L. Ed. 645, 34 S. Ct. 413;

Wegman v. *Childs*, 41 N. Y. 159;

Clark v. *Roller*, 199 U. S. 541, 50 L. Ed. 300, 26 S. Ct. 141;

Great Western Telegraph Co. v. *Burnham*, 162 U. S. 339, 40 L. Ed. 991, 16 S. Ct. 850;

Ex parte Munford, 57 Mo. 603;

Brown v. *Foss*, 16 Me. 257.

The reversal on the first appeal was an interim determination in the course of this litigation, and before final decision on the merits, that the tolling theory was untenable. It did not extinguish the cause of action. At the time that the case was remanded, the merits were still undecided. Final decision on the merits depended on further proceedings. Appellant at that time acquired no vested immunity from liability by reason thereof.

6. Appellant is in error in urging that the Legislature may not change the law applicable to pending cases.

The matter of change of law applicable to pending actions is wholly within the power of the State courts, and the doctrine of the law of the case merely expresses the practice of courts generally to refuse to reopen what has been decided, but is not a limit on their power.

In *King* v. *West Virginia*, 216 U. S. 92, 54 L. Ed. 396, 30 S. Ct. 225, Mr. Justice Holmes said:

> "The cases remained within the jurisdiction of the state court, and if, by local practice, the lower or higher court had power to change an earlier decree in the cause by direct order, or indirectly, by construction,

which latter we by no means intimate was done, it is a matter that cannot be complained of here. See Patterson *v.* Colorado, 205 U. S. 454, 460, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689. It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. Remington v. Central P. R. Co., 198 U. S. 95, 99, 100, 49 L. ed. 959, 963, 25 Sup. Ct. Rep. 577. See Great Western Teleg. Co. *v.* Burnham, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. In some states it is true that a stricter rule is applied (Northern P. R. Co. *v.* Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724), but *there is nothing in the Constitution of the United States to require it, or to prevent a state from allowing past action to be modified while a case remains in court.* See San Francisco *v.* Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241. *The highest court of the state* is the final judge of the powers conferred by the state laws in that regard." (Italics ours.)

Plainly, appellant's contention that it acquired some vested right by virtue of the decision on the first appeal is without substance and presents no Federal question.

Even appellant's authorities concede that the Legislature possesses the power to affect pending actions.

McCullough v. *Virginia* (1898) 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134;

This court has so held repeatedly.

Dinsmore v. *Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45;

Union Pacific Railroad Co. v. *Snow*, 231 U. S. 204, 58 L. ed. 184, 34 S. Ct. 104;

Carpenter v. *Wabash Railway Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 416;

Robinson v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 579. Petition for Writ of Error dismissed, 271 U. S. 649, 70 L. Ed. 1131, 46 S. Ct. 636.

See also: *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033 (where the Legislature lifted the bar after the Supreme Court decision had been handed down, but while the action was still pending).

Legislative interference retrospectively with rights crystallized to a much greater degree than the claimed vested right in this case has been sustained under the due process clause.

Evans-Snider Buel Co. v. *McFaddin* (C. C. A. 8), 105 Fed. 293, affirmed *McFaddin* v. *Evans-Snider Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012, 22 S. Ct. 758 (where rights obtained by an attaching creditor were subjected by a subsequent act to the equity of a prior mortgage invalid because improperly recorded. This court rejected the claim that a retroactive statute deprived the holder of the attachment lien with notice of the prior equity of property without due process).

Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558, 60 S. Ct. 414 (where this court sustained an act granting priority to railroad employees for personal injury damages over other claims in equity receiverships. The act was passed while certiorari was pending in this court from a contrary court decision upon priority).

Paramino Lumber Co. v. *Marshall*, 309 U. S. 370, 84 L. Ed. 814, 60 S. Ct. 600 (where this court sustained a private act of Congress, directing a review from an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act after there

had been a final award and after the time for review of the award had expired).

See also: *Watson* v. *Mercer*, 8 Pet. (U. S.) 100, 8 L. Ed. 876;

Randall v. *Kreiger*, 23 Wall. 137, 23 L. Ed. 124;

Terry v. *Anderson*, 95 U. S. 628, 24 L. Ed. 365.

Ewell v. *Daggs*, 108 U. S. 143, 27 L. Ed. 682, 23 S. Ct. 408;

Louisiana v. *New Orleans*, 109 U. S. 285, 27 L. Ed. 936, 23 S. Ct. 211;

Freeland v. *Williams*, 131 U. S. 405, 33 L. Ed. 193, 9 S. Ct. 763;

Neilson v. *Kilgore*, 145 U. S. 487, 36 L. Ed. 786, 12 S. Ct. 943;

Morley v. *Railway Co.*, 146 U. S. 162, 36 L. Ed. 925, 13 S. Ct. 54;

Demorest v. *City Bank Farmers Trust Co.*, 88 L. Ed. 340.

III.

CLAIM THAT 1941 LAW DENIES APPELLANT EQUAL PROTECTION OF THE LAWS BECAUSE THE LAW APPLIED ONLY TO APPELLANT AND ONE OTHER CORPORATION AND TO SALES MADE ONLY BY THEM (Assignments of Error 4 and 5).

This contention raises no Federal question.

1. The 1941 Law on its face is general and applied to all persons, natural or corporate, resident or non-resident, and to all securities transactions. No arbitrary classification is apparent from the face of the law. Nor is the claim made by appellant that by its terms, any discrimination was intended.

See: *Laws of Minnesota*, 1941, Ch. 547, Sec. 1 (definitions of "person", "security", "broker", and "investor").

2. The contention rests on appellant's misinterpretation of what the court actually said in its opinion. It did not say nor hold that the law was limited in its application to appellant and National City Company and to sales of unregistered securities by them. On the contrary, it specifically referred to a "multitude of sales of this and *other* unregistered stock". It also said: "That it (the Legislature) had all the cases *similar* to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered."

Published reports of adjudicated cases contain reference to similar claims against other security dealers arising out of transactions in Minnesota.

Sivertsen v. *Bancamerica-Blair Corporation*, 43 Fed. Supp. 233;

Babcock v. *Bancamerica-Blair Corporation*, 212 Minn. 428, 4 N. W. (2d) 89.

Judicial notice by this Court of the calendars of its inferior courts would disclose similar suits against others.

See: *Collins* v. *Chase Securities Corporation, Dillon Read & Company, et al.* (U. S. D. C., Minn. 4th Div. No. 146 Civil);

Case v. *Blythe & Co.* (U. S. D. C., Minn. 4th Div. No. 731 Civil).

3. Notice by the court of the circumstances and reason leading up to the enactment of the 1941 law was proper in confirmation and support of the clear meaning of the words, regarded by the State court as clear and without ambiguity. It specifically said that, "the circumstances under which the law was enacted support the indicated purpose", which was "expressed in clear language without qualification."

Donaldson v. *Chase Securities Corporation* (Minn.) 13 N. W. (2d) 1, 4;

See: *U. S.* v. *Missouri Pacific Ry. Co.*, 278 U. S. 269, 73 L. Ed. 377, 46 S. C. 133.

By referring to the litigation of record involving appellant and National City Company, the State Court was pointing to some of the circumstances which led to the enactment of the law. Conditions which lead to passage of legislation need not be universal, and affect everyone alike. A specific instance, or special circumstances prompting the Legislature to pass a general law, do not compel a construction that the general law is special. Otherwise, most general laws would be construed as special, because most general laws are prompted by specific instances. Appellant confuses the specific occasion which sets the legislative process in motion with general application of the law enacted.

4. Far from denying appellant equal protection of the laws, the 1941 Law in important respects conferred upon appellant advantages which it did not theretofore enjoy. At the end of the one-year period, undiscovered or unasserted claims against appellant based on representation of registration implied from the sale, or concealment of non-registration, were no longer subject to limitations dating from discovery. At the end of the one-year period, all such claims were governed by the six-year limitation statute, dating from date of delivery of the security and not from date of discovery of the fraud. Elimination of limitations dating from discovery was an advantage it did not theretofore enjoy.

5. The question was not raised until after the Supreme Court decided this case on the only two issues tendered by appellant for decision, namely, (1) intent of the Legislature to lift the bar, and (2) power of the Legislature to lift the bar.

The following quoted portion from page V of the Index to Appellant's Brief in the State Supreme Court shows that it made no other contentions on appeal:

> "V. The 1941 Statute Does not Revive Any Outlawed Cause of Action which Plaintiff May have had.
>
> 1. No legislative intention to revive barred action is shown.
>
> 2. There is no constitutional power to revive barred actions."

The claim, in any event, cannot be considered now, because it was not raised until the Petition for Re-hearing.

American Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98.

The 1941 Law is a general and not a special law. It applies to all violators and not alone to appellant and National City Company or to sales made only by them.

IV.

Claim that Appellant was Denied a Fair Trial (Assignment of Error 6)

For the first time, appellant, in its Petition for Re-hearing, claimed that it was denied due process of law because it was not given an opportunity to offer extraneous evidence as to legislative intent.

Aside from the fact that this court will not consider contentions made for the first time in a petition for rehearing to the state court, where the petition is denied without opinion.

Godchaux Co. v. *Estopinal*, 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116;

American Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98,

appellant was not denied due process, because

1. Appellant had its day in court and several opportunities to be heard after due notice of the issue, but did not see fit to take advantage thereof.

Appellant offered no evidence on this issue to the trial court. It certainly was aware then of plaintiff's contention that the 1941 Law applied to this case. (See plaintiff's Motion for Supplemental Findings, May 16, 1941.) After the trial court filed its findings in favor of plaintiff on this point, among others (Appendix "B", par. XXXII) appellant must have been aware then that the court had held that the Legislature had intended the 1941 Law to be applicable to cases of this nature. Still it offered no evidence. In its briefs on appeal to the state Supreme Court, appellant submitted the issue of legislative intent on the record as made, without offering anything more. The first time appellant advanced its present claim of lack of due process was in its application for re-hearing after the unanimous decision by the state Supreme Court against it.

In this connection, appellant made an attempted offer of proof in the Supreme Court, which was irregular and untimely.

Smith v. *St. Paul*, 69 Minn. 276, 72 N. W. 104, 210.

It never claimed and does not now claim that the alleged proof was previously unavailable to it or was newly discovered.

Due process is not denied if litigants are afforded an opportunity to be heard at any time before final judgment is entered.

Wilson v. *Standefer*, 184 U. S. 399, 46 L. Ed. 612, 22 S. Ct. 384;

Cf. Am. Surety Co. v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98;

12 *Am. Jurisprudence, Constitutional Law*, Sec. 611, p. 305;

16 *C. J. Sec.*, Sec. 567 b.

2. Where a statute is clear and unambiguous, extraneous materials are inadmissible.

The state court explicitly held that the plain meaning of the 1941 Law required a construction that the Legislature intended to lift the bar of limitations as to causes of action more than five years old. It said in its opinion:

> "The purpose is expressed in *clear* language without qualification."

The references to significant circumstances leading up to the enactment of the 1941 Law were confirmatory of the plain meaning of the words used. Under these circumstances, the alleged extraneous evidence could not have been received.

Precisely the same situation was before this court in *United States* v. *Missouri-Pacific Ry. Co.*, 278 U. S. 269, 73 L. Ed. 322, at 377, 49 S. Ct. 133,

where legislative materials, statements by those in charge of the measure, and other like extraneous matter were offered in evidence in the lower court by appellant. This court drew a distinction between the permitted use of such material in construing an ambiguous statute and the forbidden use thereof to add to or take away from the significance of words used in an unambiguous statute. This court said:

> "Appellants seek to support the view for which they contend by some of the legislative history of the enactment and especially by explanatory statements made by Senator Elkins in connection with the report of the majority of the Senate committee submitting the bill.

for the act in question. Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 325, 41 L. ed. 1007, 1022, 17 Sup. Ct. Rep. 540; Pennsylvania R. Co. v. International Coal & Min. Co., 230 U. S. 184, 199, 57 L. ed. 1446, 1452, 33 Sup. Ct. Rep. 893, Ann. Cas. 1911 A, 315; Mackenzie v. Hare, 239 U. S. 299, 308, 60 L. ed. 297, 300, 36 Sup. Ct. Rep. 106, Ann. Cas. 1916E, 645; Caminetti v. United States, 242 U. S. 490, 61 L. ed. 455, L. R. A. 1917 F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168."

The rule against use of legislative materials for the purpose of construing a statute contrary to its plain terms does not constitute a denial of due process.

See: *Pennsylvania R. Co. v. International Coal & Min. Co.*, 230 U. S. 184; at 189, 57 L. Ed. 1446, at 1452, 33 S. Ct. 893.

This is in accord with the rule long followed in Minnesota.

See: *Dunnell's Minnesota Digest*, Sec. 8938.

In *Oppegaard v. Board of Commissioners*, 120 Minn. 443, 139 N. W. 949, the Minnesota Supreme Court held that:

"extrinsic facts can be resorted to in aid of construction only where the intent cannot clearly be ascertained from the statute; and that when we ascertain the true sense of words, the same being their apparent and obvious meaning, we should not seek for others."

3. The state court's reference to circumstances and background of the 1941 Law as confirmatory of the plain meaning of an unambiguous statute was permissible.

With respect to the claim urged by appellant herein that the state court denied it due process because it judicially noticed the obvious circumstances and reasons leading up to the enactment of the 1941 Law, this court in *United States* v. *Missouri-Pacific Ry. Co., supra,* said:

> "But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used. Johnson v. Southern P. Co., 196 U. S. 1, 19, 21, 49 L. ed. 363, 370, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Northern P. R. Co. v. Washington, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 Sup. Ct. Rep. 160; McLean v. United States, 226 U. S. 374, 381, 57 L. ed. 260, 263, 33 Sup. Ct. Rep. 122."

This court has on numerous occasions taken judicial notice of the reasons and circumstances leading up to the enactment of statutes where constitutional questions were involved.

See: *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 255, 54 S. Ct. 231; *Railroad Retirement Board* v. *Alton Ry. Co.,* 295 U. S. 330, 79 L. Ed. 1468, 55 S. Ct. 758.

Here, as in *United States* v. *Missouri Pacific Ry. Co.,* supra, the reference to the reasons and circumstances leading up to the enactment of the 1941 Law was confirmatory of the clear meaning. With respect to this point, the state court said in its opinion:

> "That purpose is expressed in clear language without qualification, and the circumstances under which the law was enacted support the indicated purpose."
>
> *Donaldson* v. *Chase Securities Corporation* (Minn.), 13 N. W. (2d) 1, 4.

4. Even if a timely offer of proof had been made, the extraneous matter would have been incompetent and totally lacking in evidentiary value.

The alleged offer of proof by its contents clearly demonstrates the frivolous character of this contention. It consisted of 1) affidavits, which showed that the legislative minutes were silent with respect to the matter of lifting the bar; and 2) affidavits of two members of the Legislature and of the Securities Commissioner, who collaborated with the Investment Bankers Association in drafting the 1941 Law that *they* had no such intention. The statements were clearly statements of private intention and no claim was made that there were any public statements to that effect.

The whole offer of proof was incompetent. The minutes of the Legislature, admittedly silent, throw no light whatever on the question of intention. But what is more important, the offer of proof in this respect violates the well settled rule that "in determining the intention of the Legislature, the intention or motives of individual members cannot be considered."

6 *Dunnell's Minn. Dig.*, Sec. 8941;
Jewell v. *Weed*, 18 Minn. 272 (247);
State v. *City of Lake City;* 25 Minn. 404;
State ex Rel. Rose Bros. v. *Clousing*, 198 Minn. 35, 268 N. W. 844;
Soon Hing v. *Crowley*, 113 U. S. 703, 28 L. Ed. 1145;
2 *Lewis-Sutherland Statutory Construction*, Sec. 496;
McQuillin, Municipal Corporations (2d Ed.), Sec. 739.

In the *Soon Hing* case, *supra*, this court said:

"The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the

> Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. *The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.*"

In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 41 L. Ed. 1007, at 1020, 17 S. Ct. 540, this court expressed its views with respect to the admissibility of statements by individual members of Congress, as follows:

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. United States v. Union P. R. Co., 91 U. S. 72, 79 (23:224, 228); Aldridge v. Williams, 44 U. S. 3 How. 9-24 (11:469-475), Taney, Ch. J.; Mitchell v. Great Works Milling & Mfg. Co., 2 Story, 648, 653; Reg. v. Hertford College, L. R. 3 Q. B. Div. 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

Due process of law does not require that a litigant have the right to conduct a plebiscite among the individual legislators who enacted a statute applicable to his case, where the

State court has held that the meaning of the statute is clear.

5. In any event the matter of construction of state statutes and of admissibility of evidence in aid of construction thereof rests finally with the state court.

The State court has construed and interpreted the 1941 Law. By its denial of appellant's application for re-hearing, it rejected appellant's so-called offer of proof.

Right or wrong, this construction presents no constitutional question. This Court has repeatedly dismissed appeals for the reason that it considers itself bound by the construction and interpretation of State statutes by State courts.

Roe v. *Kansas, supra,* and
Cases cited in Subdivision I (a) (1) hereof.

This Court will not review the question of admissibility of evidence in the State court.

Chaplinsky v. *State of New Hampshire,* 315 U. S. 568, 86 L. Ed. 1031, at 1036, 1037, 62 S. Ct. 766,

where this Court said:

"Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied does not contravene the Fourteenth Amendment."

Procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of State regulation and control.

Hardware Dealers Mutual Fire Ins. Co. of Wis. v. *Glidden Co.,* 284 U. S. 151, 76 L. Ed. 214, 52 S. Ct. 69.

Assignment of Error 7 is too general to present any issue.

Conclusion.

Appellees respectfully submit that no Federal questions have been raised by appellant, and it is urged that appellant's Petition for Appeal be dismissed.

Appellees further respectfully submit that, even if this Court should hold that Federal questions are involved, they are of no merit or substance, and appellees' motion to dismiss or affirm should be granted.

Respectfully submitted,

LEONARD, STREET, AND DEINARD,
GEORGE B. LEONARD,
HYMAN EDELMAN,
Minneapolis, Minnesota;
S. P. GISLASON,
New Ulm, Minnesota,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, now known as Amerex Holding Corporation,

Appellant,

vs.

RUTH CHASE DONALDSON (Frank A. Donaldson and Frank A. Donaldson, Jr., executors of the Estate of Ruth Chase Donaldson, deceased), Substituted as Respondents,

Appellees,

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

Now come Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, deceased, Appellees in the above entitled case, by their attorneys of record, and move that the appeal herein be dismissed, or that the judgment sought to be reviewed herein be affirmed.

LEONARD, STREET, and DEINARD,
GEORGE B. LEONARD,
HYMAN EDELMAN,
Minneapolis, Minnesota, and
S. P. GISLASON,
New Ulm, Minnesota,
Attorneys for Appellees.

APPENDIX "A".

No. 11453

CITY CO. OF NEW YORK, INC.

v.

STERN

Circuit Court of Appeals, Eighth Circuit.

March 18, 1940.

REHEARING DENIED APRIL 6, 1940.

1. *Licenses.*

Sales of corporate stock in violation of the Minnesota Blue Sky Law are illegal and void and there is an obligation raised by law on the part of the seller to refund money procured by means of such sales. Mason's Minn. St. 1927, § 3996-1 et seq.

2. *Limitation of actions.*

Where only defense to right to recover on ground of violation of Minnesota Blue Sky Law was the statute of limitations, the statute began to run on the date of sale of corporate stock involved. Mason's Minn. St. 1927, § 3996-1 et seq.

3. *Limitation of actions.*

Where New York corporation when licensed to do business in Minnesota appointed Securities Commissioner its attorney for service of process but surrendered its license in August, 1934, and filed a resolution of withdrawal from state and irrevocably appointed Secretary of State attorney for service of process and removed from Minnesota its offices and representatives, the corporation "departed" from and "resided out of" Minnesota and the subsequent period was a "time of absence" within statute providing that if any person "departs" from and "resides out of"

the state the time of his absence is not part of time limited for commencement of action, so that action instituted in November, 1937, for violation of Minnesota Blue Sky Law in sale of corporate stocks in 1920 was not barred by six-year statute of limitations, notwithstanding that corporation remained amenable to process in Minnesota. Mason's Minn. St. 1927, §§ 3996-1 et seq., 7494, 9191, 9200.

See Words and Phrases, Permanent Edition, for all other definitions of "Departs", "Resides Out of" and "Time of Absence".

4. *Corporations.*

A corporation is present in a state only when it is represented there by its officers or agents with some measure of authority to act for it.

5. *Courts.*

Consent to the jurisdiction of the courts of a state by an individual or corporation residing outside the state implies neither presence nor residence within the state, since jurisdiction of courts to determine controversied does not necessarily depend upon residence of parties within the territorial jurisdiction of court.

6. *Courts.*

A citizen of a foreign state may maintain an action in the courts of another state and with his consent he may be sued where he does not reside and is not present. U. S. C. A. Const. art. 4, § 2.

7. *Courts.*

All the parties may be nonresidents of the state where action is brought.

8. *Limitation of actions.*

Where Minnesota tolling statute unequivocally provided that, if after cause of action accrued against a person he departed from and resided out of the state, the time of his

absence was not part of time limited for commencement of action, federal court had no power to read into the unambigous language of the statute an exception based on amenability to service of process in Minnesota. Mason's Minn. St. 1927, § 9200.

9. *Courts.*

Decision of Minnesota Supreme Court construing the Minnesota tolling statute was binding on federal court, but decisions of Minnesota District Courts were not controlling but might be considered. Mason's Minn. St. 1927, § 9200.

Woodrough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Matthew M. Joyce, Judge.

Action by Jay S. Stern against the City Company of New York, Incorporated, to recover the purchase price of twenty shares of capital stock of the National City Bank of New York, with interest. From a judgment for plaintiff, 25 F. Supp. 948, defendant appeals.

Affirmed.

M. J. Doherty, of St. Paul, Minn. (W. E. Rumble and Doherty, Rumible, Butler, Sullivan & Mitchell, all of St. Paul, Minn., on the brief), for appellant.

Benedict S. Deinard, of Minneapolis, Minn. (George B. Leonard, Hyman Edelman, and Leonard, Street & Deinard, all of Minneapolis, Minn., on the brief), for appellee.

C. E. Phillips and Phillips, Sherwood & Hughes, all of St. Cloud, Minn., amicus curiae for Investment Bankers Ass'n of America, Minnesota Division.

T. O. Streissguth, of New Ulm, Minn., amicus curiae.

G. A. Youngquist and Fowler, Youngquist, Furber, Taney & Johnson, all of Minneapolis, Minn., amicus curiae.

Before Stone, Woodrough, and Thomas, Circuit Judges.

THOMAS, Circuit Judge:

The question presented on this appeal is whether the appellee's cause of action is barred by the statute of limi-

tations. The appellant, a New York Corporation, and defendant below, sold to the plaintiff, a citizen of Minnesota, in four installments 20 shares of the capital stock of the National City Bank of New York coupled with a beneficial interest in the stock of the defendant corporation and in the stock of City Bank Farmers Trust Company. The first sale for 5 shares was made on February 4, 1929; the second for 5 shares on April 4, 1929; the third for 5 shares on July 12, 1929; and the fourth for 5 shares on October 16, 1929. This suit to recover the purchase price of the stock with interest was commenced in the district court November 12, 1937, more than six years after the dates of the sales. The right of recovery was based on the grounds (1) that the sales were illegal and void because the stocks were not registered as required by the Blue Sky Laws of Minnesota, Mason's Minn. St. 1927, § 3996-1 et seq., and (2) that there was fraud, both actual and implied, in the sales. The defendant pleaded the statute of limitations and denied fraud. The plaintiff tendered into court the stock and the dividends received thereon; a jury was waived by stipulation; and the court found in favor of the plaintiff and rendered judgment for the purchase price of the stock and interest less the dividends. Stern *v.* National City Company of New York, D. C., 25 F. Supp. 948.

Section 9191 of the 1927 Statutes of Minnesota prescribes a six-year limitation for causes of action upon contract, upon a liability created by statute, and for relief on the ground of fraud "in which case the cause of action shall not be deemed to have accrued until the discovery" of the fraud.

Section 9200 of the statute provides that "* * * if, after a cause of action accrues [against a person], he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action."

The six-year period had expired before this action was begun; but the plaintiff contends, and the court held, that (1) the period of limitation was tolled by the departure of the defendant from and its residence out of the state since

1934, and (2) that for the cause of action based upon fraud the six-year period did not begin to run until the fraud was discovered just before the commencement of this suit.

The facts upon which plaintiff bases his claim that the six-year statute was tolled are not in dispute. The defendant was a New York corporation engaged in business as a dealer in bonds, stocks and other securities. It was licensed to do business in Minnesota as a foreign corporation in 1917, and on August 13 of that year it was licensed as a dealer or broker under the Blue Sky Law of the state. Pursuant to successive annual applications it continued to operate as such broker until August 9, 1933. In connection with its license as a broker defendant in compliance with law filed a power of attorney irrevocably appointing the Commissioner of Securities its attorney for the service of process in any action involving any transaction covered by the Blue Sky Law. Service in this case was made on the Commissioner.

On August 23, 1934, the defendant surrendered its license to carry on business in the state as a foreign corporation. In compliance with section 7494 of the Minnesota statutes it filed at that time in the office of the Secretary of State a "Resolution of Withdrawal" from the state and irrevocably appointed the Secretary of State attorney for the service of process upon it in any action arising out of any business done by it while licensed to do business in the state.

Having thus formally withdrawn from doing business in the state the defendant removed from the state its offices, agents and representatives which it had maintained there during the period covered by its license.

[1, 2] It is conceded that the sales were in violation of the Minnesota Blue Sky Law. Putting to one side the alleged fraud as a basis of recovery, it is settled that such sales are illegal and void and that there is an "obligation raised by law" on the part of the appellant "to refund the money procured by means" of such sales. Webster v. United States I. Realty Co., 170 Minn. 360, 212 N. W. 806, 807; Vercellini v. United States I. Realty Co., 158 Minn. 72, 196 N. W. 672; Drees v. Minnesota Petroleum Co., 189

Minn. 608, 250 N. W. 563. The only defense to the right to recover solely on the ground of violation of the Blue Sky Law is the statute of limitations. The statute began to run on the date of the sales. Burzinski v. Kinyon Investment Co., 192 Minn. 335, 256 N. W. 233, 236; Olesen v. Retzlaff, 184 Minn. 624, 238 N. W. 12, 239 N. W. 672, 78 A. L. R. 891. Unless, therefore, the six-year period was tolled by defendant's surrender of its license to do business in Minnesota and its withdrawal therefrom in 1934, the cause of action for recovery for violation of the Blue Sky Law was barred when this suit was commenced in 1937. Whether the limitation was tolled or not depends upon the proper construction and application of section 9200 of the 1927 Minnesota statutes, supra.

It is the contention of the plaintiff, that the tolling statute must be construed literally, and that when so construed the defendant by withdrawing from the state departed therefrom, that it resided out of the state thereafter and that it has been absent therefrom ever since. It is the contention of the defendant that the statute should not be construed literally but with reference to its intent and that when so construed the defendant remained in the state within the meaning of the statute so long as it was amenable to process therein by service upon its designated attorney, either the Secretary of State or the Commissioner of Securities.

[3, 4] Under section 9200 the period of limitation is tolled when the party liable "departs from and resides out of the state" *diramg* "the time of his absence." Literally construed we think there is no doubt that the defendant "departed" from the state when it ceased to do business therein, cancelled its license, filed its resolution of withdrawal and removed its offices and representatives from the state. Since that time it has been literally "absent" from Minnesota and, in so far as Minnesota is affected, it has thereafter "resided" in New York, the state of its creation. When it departed it left no officer or agent in the state with authority to represent it in any business transaction whatever. The Secretary of State and the Commissioner of Securities, its designated attorneys for

service of process, are its agents in no such sense as to represent the continued corporate presence of the defendant in the State of Minnesota. They are merely the instrumentalities through which the defendant is subject to service in certain types of actions. Their presence in the state is not the presence of the corporation. A corporation is present in a state only when it is represented there by its officers or agents with some measure of authority to act for it. Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291. In the case of Garber v. Bancamerica-Blair Corporation, 205 Minn. 275, 285 N. W. 723, 726, the Supreme Court of Minnesota quoted with approval from Gaboury v. Central Vermont Ry. Co., 250 N. Y. 233, 237, 165 N. E. 275, 277, the statement that "presence within the state imports the use of corporate power by corporate representatives." In this instance the powers of attorney filed by appellant designating the Secretary of State and the Commissioner of Securities as its attorneys for the service of process in a limited and restricted class of proceedings conferred no authority upon them as agents to use its corporate powers for any purpose.

Nor can the defendant be said to reside and be present in Minnesota merely by reason of the fact that it remains subject to the jurisdiction of her courts in certain classes of actions. In this instance the right of the state to acquire jurisdiction in personam over the departed corporation in a limited class of actions does not rest on the basis of a fiction of continued presence in Minnesota but upon the defendant's express consent to accept service through designated attorneys. Neirbo Company et al v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. —, Decided November 22, 1939; Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co. et al., 60 S. Ct. 215, 84 L. Ed. —, decided January 15, 1940; Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610; Morris & Co. v. Skandinavia Ins. Co., 7 Cir., 81 F. 2d 346; Bagson v. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389; Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 91 N. W. 1115, 94 Am. St.

Rep. 699; McClamroch v. Southern Surety Co., 193 Iowa 249, 187 N. W. 41; Restatement of Conflict of Laws, §91. It arises out of a contract between the defendant and the State of Minnesota made by the state for the benefit of its citizens and not for the benefit of the defendant. Magoffin v. Mutual Reserve Fund Life Ass'n, supra, 91 N. W. at page 1116; Bagson *v.* Philadelphia & Reading Coal & Iron Co., supra. The contract might have provided that in its absence from the state the defendant would remain amenable to service of process by mail or otherwise in such personal actions. Restatement of Conflict of Laws, §§ 81, 90.

[5, 6] Consent to the jurisdiction of the courts of a state by an individual or corporation residing outside the state implies neither presence nor residence within the state. Jurisdiction of courts to determine controversies does not necessarily depend upon the residence of the parties within the territorial jurisdiction of the court. A citizen of a foreign state may maintain a suit in the courts of another state (Constitution Art. 4, §2; Canadian Ry. Co. v. Eggen, 252 U. S. 553, 560, 40 S. Ct. 402, 64 L. Ed. 713) and, with his consent, he may be sued where he does not reside and is not present. Pennoyer v. Neff, 95 U. S. 714, 735, 24 L. Ed. 565. All the parties may be nonresidents of the state where suit is brought. Neirbo Company v. Bethlehem Shipbuilding Corporation, supra.

[7] The problem to be determined therefore, is whether the Minnesota tolling statute may be construed as not applicable to the defendant corporation notwithstanding that literally and in point of actual fact the defendant has departed from, resided out of, and remained absent from, that state since 1934. Stated otherwise, we must determine whether the fact that the defendant remained amenable to service of process in Minnesota authorizes us to read an exception into the literal terms of the Minnesota tolling statute. The general purpose of such statutes is well known. But the language of this statute is unequivocal and expresses no qualifications or exceptions. Had the Minnesota legislature intended to make non-amenability to service the test of the tolling of limitations it could easily have done so. Some states have added such an ex-

ception. See New York Civil Practice Act, §19, construed in Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N. Y. S. 2d 749; Id., 278 N. Y. 576, 16 N. E. 2d 110. But unless authority may be found in some controlling Minnesota decision we have no power to read into the unambiguous language of the statute an unexpressed intent of the legislature. If the statute seems to operate inconsistently with its probable intent the power to amend it is in the Minnesota legislature and not in a federal court.

The defendant contends, however, that within the intendment of section 9200 it did not in 1934 "depart from" the state and has not since "resided out of" it, and the subsequent period has not been a "time of absence" from the state. Its argument is not that these things are not literally true but that the whole matter of corporate presence and residence is at most a fiction and that since it remains amenable to process it should be held to have retained a constructive presence in Minnesota so as not to fall within the spirit of the tolling section even though it may be said to be within its literal terms. The decisions of the courts of other jurisdiction are in conflict upon the principle of construction advocated by defendant, and no useful purpose would be served in reviewing them here. The Minnesota decisions relied on to support defendant's theory are City of St. Paul v. Chicago, M. & St. P. Ry. Co., 1891, 45 Minn. 387, 48 N. W. 17; and American Loan & Investment Co. v. Boraas, 1923, 156 Minn. 431, 195 N. W. 271.

In the St. Paul case, supra [45 Minn. 387, 48 N. W. 21], it was contended that a foreign corporation cannot have the benefit of the statute of limitations, although authorized to do business in the state, for the reason that such corporation is "out of the state." The court, although the decision is not based upon that point, said that under such circumstances a foreign corporation is not "out of the state"; and in discussing that situation the court said: "The mere theoretical domicile of a corporation in another state, by reason of its having been created under the laws of such state, does not make it out of the state, any more than does the theoretical domicile of a natural person make him out of the state where it is practically within the state

for all the purposes of its courts acquiring full and complete jurisdiction over it. The purpose of the statute of limitations in allowing specified times for commencing actions, and in making exceptions to the running of such times is a practical one. It is to give to plaintiff what the legislature deemed a reasonable opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in any way a full and complete remedy for the times specified, can have been intended by section 15." Mason's Minn. St. 1927, § 9200.

As applied to the facts of that case no one could doubt the applicability of this language. In that case the defendant was not only authorized to do so, but it was actually carrying on business in the state and therefore was present within its jurisdiction. It was not absent merely because it was created under the laws of another state. But as applied to the facts in the instant case the language there used loses much if not all of its force even if it were not dicta. Cohens v. Virginia, 6 Wheat. 264, 399, 19 U. S. 264, 398, 5 L. Ed. 257; Harriman v. Northern Securities Co., 197 U. S. 244, 291, 25 S. Ct. 493, 49 L. Ed. 739.

In the Boraas case, supra, the American Loan & Investment Co., a North Dakota corporation, complied with the Minnesota corporation laws and was authorized to do business therein. While so authorized and while actually engaged in carrying on business in the state it brought suit in the Minnesota court against Boraas. Thereafter it formally withdrew from the state. Boraas thereupon amended his answer and interposed as a plea in abatement the withdrawal of the plaintiff from the state, the surrender of its certificate and the fact that the company had ceased to do business in the state. The plea was sustained. The Supreme Court reversed on appeal and in the course of the opinion said [156 Minn. 431, 195 N. W. 272]: "Notwithstanding the steps taken in that respect [withdrawal] the corporation, as to all unadjusted transactions theretofore entered into with citizens of the state, remained in this state, in contemplation of law, subject to the jurisdiction of its courts by the service of process in the manner provided by the license."

It will be noted in this case that neither the statute of limitations nor the tolling statute was involved. The suit was begun by the corporation before it withdrew from the state. As applied to the facts of the case the language quoted means only that after a foreign corporation has "withdrawn" from the state it remains "amenable", that is, "subject to the jurisdiction of its courts by the service of process in the manner provided by the license." The statement does not unequivocally mean that the corporation remains a resident of the state. Such an interpretation of the decision is in conflict with the later pronouncement of the Supreme Court of Minnesota in the Garber case, supra.

The effect upon the tolling statute of amenability to service of process was not decided in either of the two cases, supra, relied upon the defendant. There are two other decisions of the Supreme Court of Minnesota which we think are more nearly in point than the cases cited above, and which control decision in this case.

In Venable v. Paulding, 19 Minn. 488, Gil. 422, the defendant, a natural person, had departed from Minnesota and during the nine years of his absence was not amenable to the service of process within the state. The court held that this fact did not prevent the statute of limitations from running if in fact the defendant retained his Minnesota domicile during a portion of the time of his absence. The Minnesota Supreme Court thus gave a literal interpretation to the tolling statute with no attempt to make its application depend upon the test of the defendant's amenabiliy or non-amenability to service of process within the state.

In Rigers v. Benton, 39 Minn. 39, 38 N. W. 765, 767, 12 Am. St. Rep. 613, the issue of whether amenability to service of process affected the application of the tolling section was again before the Minnesota Supreme Court. In that case a mortgagor left the state and resided permanently in another state, but his family continued to reside in the state at the homestead on the mortgaged premises. The issue was whether limitations had been tolled so as to permit an action to foreclose. The court, in determing

that such absence tolled the running of the statute of limitations against the right of action to foreclose, said: "This brings us to the first important legal question in the case, viz., whether the right to foreclose by action still continued when the Conants went into possession, June 1, 1876. This cause of action accrued against Benton in December, 1858, and under Laws 1870, c. 60, would have been barred September 8, 1870, unless saved from the operation of the statute by his departure from and residence out of the state. It has been determined that the exception in section 15, c. 66, Gen. St. 1866 [section 9200 Statutes of 1927], from the time limited for commencing actions, of the time during which the defendant resides out of the state, applies to an action to foreclose a mortgage upon real estate. * * * his absence was a permanent change of residence, and, if so, it was of no legal importance that his family remained behind. The fact that Conant might, notwithstanding the new residence of the mortgagor, have resorted to substituted service of the summons, would not take the case out of the statutory exception."

[8] In this case the court was considering the identical question presented on this appeal, and it held that mere amenability to service of process within the state upon one against whom a cause of action had accrued and who thereafter departs from and resides out of the state does not take the cause of action out of the exception to limitations contained in section 9200. The decision does not, of course, declare that substituted service upon a nonresident would be valid in every instance. Its purport is that assuming such service to be valid it would not take the case out of the statutory exception. In other words, the decision holds that in a case where the defendant is a natural person the words "departs from and resides out of" the state are to be construed literally and that possible amenability to service of process does not permit an exception to the tolling statute. This decision of the Minnesota Supreme Court is the only one squarely in point on the construction of the tolling statute, and it is binding on the federal court.

[9] While the decisions of the district courts of Minnesota as to the interpretation of its statutes are not control-

ling on the federal court, the reasoning of such decisions is often persuasive and even convincing. In this instance we are in accord with three Minnesota district court decisions which have been called to our attention, and in which section 9200 is construed to apply to a foreign corporation after it has withdrawn from the state. Coleman v. City Company of New York, D. C. Ramsey County; Samsen v. National City Company, D. C. Brown County; Seifert v. National City Company, D. C. Brown County.

In view of the conclusion which we have reached upon the first issue it is not necessary to extend this opinion with a discussion and determination of the contentions of the parties in respect of fraud.

Affirmed.

WOODROUGH, Circuit Judge (dissenting).

My conclusion is contrary to that reached by the majority of the court. It seems to me that the six-year statute of limitations was not tolled in this case. The corporation defendant complied with Section 7494 of the Minnesota Statutes and so remained at all times throughout the limitation period completely amenable to process upon its agent in the state. The literal wording of the tolling statute (Sec. 9200) does not extend to corporations at all without judicial reasoning and I think that there is no sound basis in reason for deciding that the statute was tolled. Neither do I find a basis for so deciding in the expressions which the Supreme Court of Minnesota used when it was not thinking or talking about corporations, but was passing on suits against individual persons who had departed from and were living in the flesh outside of the state beyond the reach of personal process.

In addition to the vast array of learning and authority able counsel for the defendant have presented against the claim that the statute was tolled, I am impressed that Section 7494 itself indicated legislative intent that the statute of limitations should not be tolled against the corporations which avail themselves of its provisions and on quitting business designate their agents for service in the state. It says that the agency shall continue as long as any cause of action

survives against the corporation and I take that to imply that the survivor shall be no longer on account of anything done by corporations under the authority of the statute.

I would reverse.

CHASE SECURITIES CORPORATION

v.

VOGEL.

No. 11469.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

March 18, 1940.

Rehearing Denied April 6, 1940.

Limitation of actions.

Where New York corporation licensed to do business in Minnesota appointed Minnesota Commissioner of Securities its attorney to accept service of process, made sale of corporate stock in May, 1929, in June, 1931, filed resolution of withdrawal and removal from state and appointed Secretary of State its attorney to accept service of process and in July, 1931, had its license canceled, action instituted in October, 1935, to recover purchase price of stock for violation of Minnesota Blue Sky Law was not barred by six-year statute, since the corporation's departure from state tolled the statute of limitations. Mason's Minn. St. 1927, secs. 3996-1 et seq., 9191, 9200.

Woodrough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Matthew M. Joyce, Judge.

Action by Joseph H. Vogel against the Chase Securities Corporation to rescind sale to plaintiff by defendant of shares of corporate stock, and for the purchase

price of the stock with interest. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. H. Stinchfield and John M. Palmer, both of Minneapolis, Minn. (Stinchfield, Mackall, Crounse, McNally & Moore, of Minneapolis, Minn., on the brief), for appellant.

T. O. Streissguth, of New Ulm, Minn., and Hyman Edelman, of Minneapolis, Minn. (George B. Leonard, of Minneapolis, Minn., Streissguth & Gislason, of New Ulm, Minn., and Leonard, Street, and Deinard, of Minneapolis, Minn. on the brief), for appellee:

Before Stone, Woodrough, and Thomas, Circuit Judges.

THOMAS, Circuit Judge:

This is an action at law brought by Vogel against appellant in the state court of Minnesota and removed by appellant, a corporation organized under the laws of New York, to the district court. The plaintiff prayed that the court rescind a sale to him by defendant on May 7, 1929, of 50 shares of the capital stock of the Chase National Bank of New York and an equal number of shares of the capital stock of the defendant corporation, and for judgment for the purchase price of the stock in the amount of $10,250, with interest. By stipulation of the parties a jury was waived and the case tried to the court. A judgment was entered for the plaintiff, and the defendant appeals.

This case is a companion to No. 11453, City Company of New York v. Stern, 8 Cir., 110 F. 2d 601, decided at this term.

The action was begun October 14, 1935, more than six years after the date of the sale of the stock.

The grounds upon which the plaintiff claimed the right to rescind the sale and recover the purchase price of the stock are: (1) That the sale was in violation of the Minnesota Blue Sky Law, giving rise (a) by reason of the violation of the act itself to the right to rescind and recover the purchase price, or (b) to the right to recover for implied or concealed fraud; and (2) that defendant's salesman had made certain false and fraudulent statements in connection with the sale

amounting to actual fraud. The defendant (1) denies fraud and (2) relies upon the statute of limitations. The plaintiff, as to the statute of limitations, claims (1) that it was tolled by defendant's departure from the state before the six-year period had elapsed and (2) that it did not begin to run until the fraud was discovered by plaintiff a few months before suit was commenced.

Except as to the question of actual fraud the issues are the same issues in No. 11453, City Company of New York v. Stern, supra. As in the Stern case, an affirmance on the ground that the statute of limitations was tolled by the departure of the defendant from the state of Minnesota, prior to the expiration of the six-year period of limitation, and its residence outside of the state since, makes it unnecessary to determine the issues of either implied or actual fraud.

The defendant was issued a broker's license under the Blue Sky Law of Minnesota in March, 1928, which was renewed annually thereafter until it was cancelled July 7, 1931. In connection with the issue of the broker's license defendant filed a power of attorney irrevocably appointing the Commissioner of Securities of the state its attorney to accept service of process on its behalf in any action against it involving a transaction covered by the Securities Act or Blue Sky Law. Service in this case was made upon the Securities Commissioner.

The sale of the shares of stock by the defendant to the plaintiff on May 7, 1929, was admitted, and it was shown that the receipt representing the stock was not registered as required by the Blue Sky Law.

The defendant was licensed as a foreign corporation to do business in Minnesota in June, 1930. On June 30, 1931, it filed a resolution of withdrawal and removed from the state. In the resolution of withdrawal it appointed the Secretary of State its attorney to accept service of process in any action against it growing out of any business done by it during the period covered by its license to do business in the state.

In the Stern case, supra, this court held that under the Minnesota law the departure of the defendant from the state and its subsequent absence therefrom and residence elsewhere tolled the statute of limitations; and that the

purchaser of securities sold in violation of the Minnesota Blue Sky Law was entitled to recover the purchase price from the seller. That decision is controlling of the same issues in this case, and it compels an affirmance of the judgment appealed from.

Affirmed.

Woodrough, Circuit Judge, dissents as indicated in City Company of New York v. Jay S. Stern, 8 Cir., 110 F. 2d 601.

APPENDIX "B".

DISTRICT COURT, FOURTH JUDICIAL DISTRICT, STATE OF MINNESOTA, COUNTY OF HENNEPIN

RUTH CHASE DONALDSON, *Plaintiff*,

vs.

CHASE SECURITIES CORPORATION, a Corporation, Now Known as Amerex Holding Corporation, *Defendant*.

Findings of Fact, Conclusions of Law and Order for Judgment.

The above entitled case being regularly on the General Term Calendar of the above Court came on for trial on May 9, 1939, before the undersigned, one of the judges of the above Court, and was tried without a jury on said day, and on May 10, 11, 12, and June 1, 2, and 10, 1939. T. O. Streissguth, and Messrs. Leonard, Street, and Deinard by Hyman Edelman, appeared on behalf of plaintiff, and Messrs. Stinchfield, Mackall, Crounse, McNally and Moore by Fred H. Stinchfield and John M. Palmer, appeared on behalf of defendant. On April 18, 1940, this court made and filed Findings of Fact, Conclusions of Law, and Order for Judgment herein, directing entry of judgment in favor of plaintiff and against defendant. On May 4, 1940, defendant interposed its motion to amend said Findings of Fact, Conclusions of Law, and Order for Judgment, or, in the alternative, for a new trial. On May 6, 1940, this court

made and filed its order, denying said motion, except for a minor correction. Said Findings of Fact, Conclusions of Law, and Order for Judgment sustained recovery by plaintiff on the ground of defendant's violation of the Blue Sky Law and the tolling of the Statute of Limitations. Therefore, the court found it unnecessary at that time to make Findings on plaintiff's claim of express fraud, fraud by implied representation, and fraud by suppression and concealment of material facts. Thereafter, defendant appealed to the Supreme Court of Minnesota from the order of this Court, dated May 6, 1940, denying its motion for amended Findings, or in the alternative for a new trial and from judgment entered in favor of plaintiff and against defendant, on June 18, 1940. The only issue involved in said appeal was the construction of the tolling statute, Mason's Minnesota Statutes, 1927, Section 9200. On January 10, 1941, the Supreme Court of Minnesota reversed said order and judgment "without prejudice", however, "to the issues other than that of the tolling of the Statute of Limitations." Thereafter, and on April 9, 1941, plaintiff moved this court for an order supplementing and correcting the Findings of Fact, Conclusions of Law, and Order for Judgment made and entered on April 18, 1940, so as to secure determination of the issues of express fraud, fraud by implied representations, and fraud by suppression and concealment of material facts. On May 16, 1941, plaintiff filed her Notice of Supplemental Motion for Additional Supplemental Findings of Fact and Conclusions of Law with respect to the applicability of Laws of Minnesota, 1941, Chapter 547. On May 14, 1941, defendant filed its motion to amend the Findings of Fact, Conclusions of Law, and Order for Judgment, dated April 18, 1940, in the particulars specified in said Notice of Motion, and for leave to argue the remaining issues of fraud and Statute of Limitations applicable thereto, and in connection with said motion defendant renewed its motions made at the conclusion of the trial, appearing in the typewritten transcript and settled case herein, at pages 466-475, to strike certain items of evidence referred to in said motions, upon the grounds therein enumerated. All of said motions were argued on

May 19, 1941, and thereafter written briefs were submitted by the parties. The Court having heard the testimony, arguments of counsel, and having examined the briefs filed herein, and being duly advised in the premises, hereby makes the following

Findings of Fact

I.

At all times herein mentioned plaintiff was, and now is, a resident of the City of Minneapolis, Hennepin County, State of Minnesota.

II.

The Chase National Bank of the City of New York (hereinafter called "the Bank") at all times herein mentioned was and now is a national banking association, organized under the provisions of the Act of Congress commonly known as the National Banking Act, and engaged in the banking business, with its banking houses and offices located and its general business conducted, in the City of New York, State of New York. On March 21, 1917, the Bank was capitalized at $10,000,000, consisting of 100,000 shares of stock of the par value of $100.00 each.

III.

Defendant (sometimes hereinafter called "the Corporation") was organized under the Business Corporation Law of New York on May 26, 1917, and ever since has been and now is a New York Corporation. The significant features of its charter will be summarized. The powers conferred on the corporation are comprehensive in scope, including authority to deal in securities. The amount of its capital was fixed at $2,500,000; no-par value shares to the number of 100,000 were to be issued; and the consideration for which it might issue and sell these shares was fixed at $25 a share. No share of its stock, issued to the Bank's stockholders, nor any interest therein, should "be sold, pledged, or otherwise disposed of or transferred, either voluntarily, by operation of law or otherwise, except

in each instance and from time to time together with a transfer to the same person or persons of a like interest in an equal number of shares of stock of said Bank. The sale, pledge or other disposition or transfer of any shares of stock of the Bank or any interest therein, either voluntarily, by operation of law or otherwise, by or in behalf of any such stockholder of the Bank or anyone claiming from or through such stockholder, either directly or by mesne transfers shall, if and to the extent that effect may then be given by law to this provision, operate ipso facto as a transfer to the same person or persons of a like interest in an equal number of shares of the stock of this corporation." All persons receiving shares of its stock as stockholders of the Bank, and those claiming under or through them, should and did irrevocably designate and appoint the "depositary with which shares of this corporation and of the Bank are deposited to insure their transfer together * * * their agent, in case of the sale, pledge, or other disposition or transfer of a share or shares of said stock of the Bank or of this corporation, or any interest therein, * * * to transfer to the same person or persons a like interest in an equal number of shares of this corporation or of the Bank, as the case may be, and to do and perform any and all acts to effectuate such transfer." The foregoing provisions might be modified or terminated by the affirmative action of the registered holders of at least seventy-five per cent (later reduced at 66⅔) of the shares of stock of the Bank and of the Corporation then outstanding and so deposited. The foregoing provisions should be stated in the certificates of stock of the Corporation.

IV.

The mechanics of arranging the affiliation between the Bank and the Corporation, contemplated by its charter, will be summarized.

Before organization of the Corporation, an agreement (herein called "the deposit agreement") dated March 21, 1917, had been entered into between all the Bank stockholders, a committee of such stockholders (herein called the "Committee") and Bankers Trust Company of New York.

Pursuant to the terms of the deposit agreement the Bank stockholders deposited all of their certificates with the Committee.

The Bank paid a special dividend of $25 a share, aggregating $2,500,000, which the Committee received. The Committee organized the Corporation, and used the fund of $2,500,000 to pay the Corporation for the 100,000 shares of its stock. Stock certificates of the Corporation were issued in the names of the depositing Bank stockholders for the same number of shares as their Bank stock. These certificates were deposited with Bankers Trust Company along with the shares of the Bank stock which the Committee had been holding; Bankers Trust Company took them as depositary for the Committee. As occasion called for the transfer of shares, new certificates would be issued, but these new certificates were printed on a single sheet, on one half a certificate for shares of the Bank stock, and on the other half a certificate for shares of the Corporation stock, and on the reverse side of the sheet were the usual printed forms for the transfer thereof. Bankers Trust Company issued to the depositing Bank stockholders receipts for their stock in the Bank and the Corporation, pursuant to the terms of the deposit agreement.

These receipts contained the following provision with reference to the deposited shares: "Neither said shares of the Bank nor said shares of the Securities Corporation are transferable separately, but this receipt and all rights and interests represented hereby are transferable by the registered holder, either in person or by attorney duly authorized on the books of the Depositary kept for that purpose, upon surrender of this receipt duly assigned, which assignment shall transfer all right, title and interest of the Depositor in the Deposited Shares. By delivering this receipt to the Depositary for transfer the holder thereof irrevocably constitutes and appoints the Depositary attorney to surrender the certificates for the Deposited shares and to receive from the Bank and from the Securities Corporation respectively in exchange therefor certificates of stock for the Deposited Shares registered in the name of the transferee hereof as entered upon the records of the Depositary, and hereby ir-

revocably authorizes the Depositary to hold the same subject to the provisions of the Deposit Agreement."

The receipts contained a printed form for the joint transfer of the deposited shares of stock of the Bank and of the Corporation represented by the receipts, and an irrevocable appointment of Bankers Trust Company as attorney for the person named in the receipt, to transfer the certificates for the deposited shares. The form included also a transfer of the receipt "and all rights and interests represented thereby."

By the provisions of defendant's charter and the deposit agreement, the shares represented by the receipts were linked together for sale and holding in such manner as to make the shares in one corporation non-transferable separately, and to make the ownership, sale, purchase, or transfer of shares in one corporation absolutely conditioned upon identical ownership, sale, purchase or transfer of shares of the other.

After the initial deposit, when the capital stock of the Bank was increased from time to time, an equal number of additional shares would be authorized and issued by the Corporation, and certificates for the new Bank shares and the new Corporation shares deposited with Bankers Trust Company, and receipts therefor issued to the persons entitled thereto.

V.

The mechanics of issuance and transfer of Bankers Trust Company receipts will be summarized.

Between 1917 and January, 1930, certificates of shares of the Bank and of the Corporation issued in the names of the persons designated in the outstanding Bankers Trust Company receipts were at all times in the custody of Bankers Trust Company in New York City. When an outstanding receipt was transferred, and surrendered by the transferee to Bankers Trust Company, the certificate for the shares of the Bank and of the Corporation represented by the surrendered receipt would be transferred by Bankers Trust Company under the power contained in the deposit agreement, to the transferee of the receipt, and a certificate for the shares of the Bank and of the Corporation would be

issued in the name of the transferee and deposited with Bankers Trust Company, which would in turn issue to the transferee a new receipt therefor in the form already described. The receipt-holders, in whose names the deposited shares stood were at all times recognized by the Bank and by the Corporation as their respective stockholders of record, entitled to vote the same, and to receive all dividends declared thereon.

VI.

By an agreement dated January 15, 1930, between Bankers Trust Company and the receipt-holders, designed to eliminate the expense incident to the use of such receipts, provision was made for the withdrawal of the receipts and the substitution of new "duplex" certificates to be issued by the Bank and by the Corporation to their stockholders. These duplex certificates were likewise printed on a single sheet, on one side a certificate for shares of the Bank stock, on the other side a certificate for an equal number of shares of the Corporation stock, each certificate bearing a legend restricting the holder from selling, pledging or otherwise disposing or transferring, "any share or interest therein in either corporation without at the same time transferring to or vesting in the same party an equal number of shares, or the same interest therein, in the other," and with one printed form for joint transfer. Thereafter the Bankers Trust Company receipts were retired, and in place thereof each stockholders received a new "duplex" certificate for the shares of the Bank and of the corporation represented by the receipt.

Hereinafter for brevity, both the Bankers Trust Company receipts and the "duplex" certificates, will be called "Chase units."

VII.

Defendant was organized and its stock inextricably bound up with the stock of the Bank, as has been described, at the instance of the Bank, its officers and shareholders acting as such, for the purpose of enabling the Bank and its stockholders to engage in business and stock operations, and to buy, hold, or sell its own capital stock.

VIII.

By amendment of its Articles of Incorporation, defendant's corporate name was changed from Chase Securities Corporation to "The Chase Corporation" in the year 1933. Thereafter, in the year 1934, its corporate name was again changed from the Chase Corporation to "Amerex Holding Corporation," which name ever since has been and still is its corporate name.

IX.

On March 22, 1928, pursuant to application made by it, defendant secured a broker's license issued to it by the Securities Division of the Department of Commerce of Minnesota, commonly known as the "Commission", under and in accordance with the provisions of Chapter 192, Session Laws of Minnesota for 1925, as amended, commonly known as the "Blue Sky Law." By successive annual applications defendant secured renewal broker's licenses for succeeding years. Said licenses authorized it to transact a lawful securities business as a broker within the State of Minnesota, subject to the provisions of said Law, for annual license periods ending March 21, 1929, 1930, 1931, and 1932.

Defendant, pursuant to the requirements of Section 3996-11, Mason's Minnesota Statutes, 1927, before being so licensed, and on March 17, 1928, appointed the Commissioner of Securities of Minnesota and his successor in office, its attorney for the service of process in any action or proceeding against it, in relation to or involving any transaction covered by said "Blue Sky Law."

X.

During the year 1928 defendant as such licensed broker appointed eight persons as its agents in Minnesota, and procured agent's licenses for them from the Commission.

During the year 1929, defendant procured the renewal of seven of said eight licenses and one additional agent's license, and thereafter by successive annual applications procured renewal agent's licenses for succeeding years. During 1928, 1929 and 1930, its licensed agents were authorized to sell, offer for sale and solicit the sale of lawful securities on its behalf within the State of Minnesota.

XI.

Defendant was also licensed as a foreign corporation on June 5, 1930, to do business in Minnesota, and continued so to be licensed until it filed a resolution of withdrawal on June 30, 1931, under and pursuant to Section 7494, Mason's Minnesota Statutes, 1927. Upon filing said resolution of withdrawal defendant appointed the Secretary of State its agent for service of process "in any action or proceeding of any nature or kind arising out of or involving anything done or omitted by said foreign corporation in this state while licensed to do business here."

XII.

From March, 1928, until July, 1931, defendant maintained offices within the State of Minnesota, fully staffed and equipped with furniture, supplies, and wire system, and was actually and continuously present and resident in the State of Minnesota, and doing business therein, and was engaged in the securities business therein, including the sale of stocks, shares, bonds, debentures and other securities directly and through its agents, in the course of continued and successive sales, and in the business of purchasing and acquiring directly and through its agents, securities for the purpose of reselling the same to others, and generally of buying, selling, otherwise dealing or trading in, promoting, negotiating, advertising and distributing such securities, under said broker's license, and defendant's agents were representing it in the State of Minnesota, and were engaged therein on its behalf in the selling, offering for sale and solicitation of the sale of securities.

As a part of its said business in the State of Minnesota, defendant was, during the entire year 1929, and for some time thereafter, engaged in the sale and disposition for value, offering for sale, and solicitation of the sale of Chase units, then in the form of Bankers Trust Company receipts.

XIII.

On or about August 8, 1929, at Minneapolis, Minnesota, defendant through one Weir Jepson, its agent duly author-

ized by it, solicited plaintiff to purchase and offered to and did sell to plaintiff eight Chase units, at a single indivisible purchase price of $1828.00, which plaintiff paid to defendant at Minneapolis on August 23, 1929. Bankers Trust Company's receipt, dated on or about September 9, 1929 (which was received in evidence as Plaintiff's Exhibit L) evidencing said eight Chase units was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about September 10, 1929.

Following the delivery of said receipt, a similar receipt, dated February 3, 1930 (which was received in evidence as Plaintiff's Exhibit M) for one Chase unit, was delivered to and received by plaintiff at Minneapolis, Minnesota, on or about February 3, 1930. This receipt represented a stock dividend of 12½% declared by defendant and the Bank upon merger with National Park Bank, to all their stockholders of record as of August 23, 1929.

XIV.

On November 6, 1930, defendant issued to plaintiff, in exchange for her Bankers Trust Company receipt, a duplex certificate for nine units, No. F 52498, which was offered and received in evidence as Plaintiff's Exhibit N.

On August 12, 1936, defendant issued to plaintiff, in exchange for said duplex certificate, two certificates, one for nine shares of Bank stock, being Certificate No. 170,762, which was offered and received in evidence as Plaintiff's Exhibit P, the other a scrip certificate for 9/10ths of a share of Amerex Holding Corporation stock, which scrip certificate was, upon the payment by plaintiff to defendant of $2.45 for 1/10th of a share of said Amerex stock, converted into one full share of Amerex stock, evidenced by certificate No. 067,711, dated August 12, 1936, which was offered and received in evidence as Plaintiff's Exhibit O.

XV.

In selling said Chase units to plaintiff, defendant impliedly represented to plaintiff: that said Chase units were duly registered pursuant to the requirements of Mason's Minnesota Statutes, 1927, Chapter 21-b; that the solicita-

tion, offer and sale of said Chase units by defendant to plaintiff were in all respects in compliance with the laws and statutes of the State of Minnesota and the United States of America, and constituted a legal and valid solicitation, offer and sale of said Chase units; that said Chase units were in all respects valid, legal and genuine; that it and its agents were duly licensed to solicit, offer for sale and sell said Chase units in the State of Minnesota.

XVI.

Plaintiff offered to buy and defendant offered to sell said Chase units at the market price and in selling said Chase units to plaintiff defendant represented to plaintiff: that there was a free, uncontrolled and unmanipulated market for said Chase units at the price at which defendant then and there offered them to plaintiff; that the purchase by plaintiff of said securities was made in a free, uncontrolled and unmanipulated market and that the price at which plaintiff purchased said units from defendant was determined by lawful and legitimate factors of supply and demand and was free from any manipulation or control by defendant.

XVII.

In selling said Chase units to plaintiff, defendant fraudulently and wilfully suppressed the facts concerning the nature and formation of said Bank and its affiliate, Chase Securities Corporation, and fraudulently and wilfully concealed and suppressed the fact that said Chase units were not registered for sale within the State of Minnesota, and were illegally sold therein and that its agent Weir Jepson was not licensed to offer for sale or to sell said Chase units within the State of Minnesota, and fraudulently and wilfully concealed and suppressed the fact that defendant at the time of said sale to plaintiff was engaged in illegal pool activities by means of which defendant controlled and manipulated the market price of said Chase units and fraudulently and wilfully concealed and suppressed the fact that the market for said Chase units at the time of the sale to plaintiff was not a free, uncontrolled and unmanipulated market.

XVIII.

Plaintiff, in purchasing said Chase units had no notice or knowledge of the facts concealed from her as aforesaid, and believed the statements and representations, and each of them, so made to her, and believed and understood that no Chase units would be sold and delivered to her in violation of the laws of the State of Minnesota, and believing and relying upon the implied representations made to her as aforesaid and not otherwise, plaintiff was induced to and did purchase from defendant Chase units as set forth in paragraph XIII; the implied representations so made by defendant to plaintiff were false and untrue as it and its agents then and there well knew.

XIX.

By the provisions of said Blue-Sky Law, Chase units were required to have been registered as therein provided, before being offered for sale or sold within the State of Minnesota. Defendant, in violation and contravention of said Law and the duties imposed upon it, wilfully and fraudulently failed to register the Chase units according to the requirements of said Law, and the Chase units were never registered or licensed to be sold in Minnesota, and the sale thereof was never authorized in Minnesota by registration under said Law. The Chase units never were within any of the classifications of securities exempted from registration under Section 3996-2 of Chapter 21-b, Mason's Minnesota Statutes, 1927, and were never exempted from the operation of the provisions of said Law, and the sale thereof was never authorized in Minnesota by exemption from said Law. The sale of Chase units to plaintiff was not within any of the classifications of exempted sales specified in Section 3996-3 of said Chapter, and was not in fact excepted from the operation of said law, nor authorized by any provision of law. Said sale to plaintiff was not an isolated sale, but was made in the course of repeated and successive sales of Chase units by defendant, which was, at the time of said sale, offering Chase units for sale, soliciting the sale thereof, and selling the same to the public generally. Defendant never applied to the

Commission for the registration of Chase units or of its own capital stock, nor did it ever notify said Commission of its intention to sell Chase units or its own capital stock, and it never in fact at any time secured the license or approval of said Commission to sell, offer to sell, solicit the sale of, or attempt to sell, or negotiate or dispose of Chase units or its own capital stock.

Defendant, at all times mentioned herein, knew and was familiar with the requirements of said Blue Sky Law and wilfully failed to register the Chase units or its own stock.

As hereinafter more specifically found, for a considerable time prior to August 8, 1929, and on said date, defendant was engaged in the manipulation of the market on Chase units through pool operations, which defendant concealed; defendant must have known that if it had attempted to register the Chase units in Minnesota it would have been compelled to reveal those facts which constituted information relative to the securities necessary for the Commission to enable it to determine whether said securities should be registered and to properly pass on an application for registration, and, with such knowledge, attempted to evade the law requiring Chase units to be registered and licensed.

XX.

By the provisions of said Blue Sky Law, defendant's agents were forbidden to sell or offer for sale any securities within the State of Minnesota unless and until such agents had received agent's licenses from the Commission in accordance with the provisions of said law. At the time of said transaction with plaintiff, defendant's agent, Weir Jepson, had not been licensed as an agent by the Commission. Defendant at no time filed with the Commission any appointment or designation of said Weir Jepson as its agent, and never obtained from the Commission any agent's license for him, but wilfully and knowingly authorized and permitted said Weir Jepson to act as its agent and illegally to offer for sale and sell Chase units to plaintiff and others in the State of Minnesota in the course of successive and repeated sales thereof within the State of Minnesota.

XXI.

The sale by defendant through its unlicensed agent to plaintiff of said unregistered Chase units was made in Minnesota, in violation of the provisions of said Blue Sky Law and was illegal, and void, and incapable of ratification or confirmation as between the original parties to the sale. Because of the linking together of shares of Bank stock and shares of the Corporation's stock, and because an entire indivisible purchase price was required to be paid and was paid by plaintiff to defendant for said Chase units, the sale to plaintiff constituted a single, entire, indivisible and non-severable purchase and sale and was wholly illegal and wholly void.

XXII.

At the time of the sale of said units by defendant to plaintiff, defendant maintained and controlled an over-the-counter market for the purchase and sale of said Chase units; said market was not free and open; the price of said Chase units was not fixed according to lawful and legitimate factors of supply and demand, nor according to bona fide bid and ask prices, but the prices at which said Chase units were sold in said market were manipulated and controlled by defendant, as hereinafter more particularly set forth.

XXIII.

Prior to January 12, 1928, the stock of the Chase National Bank was listed on the New York Stock Exchange, and on said date was delisted at the request of said Bank. The stock of the Chase Securities Corporation was never listed on said New York Stock Exchange. After January 12, 1928, said units were traded in exclusively on the over-the-counter market maintained by defendant.

XXIV.

At the time of the sale of said units by defendant to plaintiff, and for a considerable time prior and subsequent thereto defendant was engaged in a vigorous and extensive campaign for the retail sale of said units to the public, for

the purpose of creating a larger clientele to whom defendant could sell and distribute stocks, bonds, and other securities from time to time at a profit.

XXV.

At all times herein mentioned, Metpotan Securities Corporation was a corporation organized and existing under the laws of the State of New York, and all of its capital stock was owned by defendant. All of the officers of said Metpotan Securities Corporation were likewise officers of defendant.

XXVI.

On September 21, 1927, defendant, through its wholly owned subsidiary Metpotan Securities Corporation, entered into a joint account or pool with McClure, Jones & Co., Potter & Co., and Blair & Co., to buy and sell Chase units. The letter and agreement confirming the organization of said pool was offered and received in evidence as plaintiff's Exhibit A-25, and is hereby expressly made a part of these Findings with like effect as though fully set out herein. The pool originally was to run for a period of sixty (60) days, commencing September 21, 1927, but was subsequently continued until March 20, 1928, and again extended until April 18, 1928. During all of said period said Metpotan Securities Corporation was the pool manager and in direct charge and control of the operations of said pool. Said Metpotan Securities Corporation was financed by defendant, and defendant furnished to it credit necessary for the carrying on of said pool activities. On December 31, 1927, said Metpotan Securities Corporation was indebted to defendant on account of advances to it in connection with said pool activities in the sum of $3,235,000. During all of said period defendant, through Metpotan Securities Corporation, daily bought and sold large blocks of said units. During the period commencing with September 21, 1927, and up to April 18, 1928, said pool purchased 22,217 units ($100 par) for $13,240,356.32, which units were sold at a profit to the pool of $50,620.73. At the time the account was opened, the quotation for Chase Securities units ($100 par) was 575 bid, 580 asked; and on April 18,

1928, the date the account was closed, the quotation was 684 bid, and 690 asked.

XXVII.

Immediately upon the close of this trading account, on April 18, 1928, another pool or trading account was formed with Metpotan Securities Corporation, Blair & Co., McClure, Jones & Co., and Potter & Co., as participants, and with Metpotan Securities Corporation and Blair & Co. carrying stock for this account. A letter from Metpotan Securities Corporation to Potter & Co., dated April 18, 1928, constituting the agreement defining the terms by which this pool was organized, was offered and received in evidence, marked Exhibit A-26, and is hereby made a part of these Findings with like effect as though fully set out herein. As in the earlier pool, the Chase Securities Corporation financed the activities of the pool by advancing and loaning to Metpotan Securities Corporation such moneys as were required from time to time for that purpose. On December 3, 1928, Metpotan Securities Corporation was indebted to defendant on account of such advances in the amount of $3,461,000. 59,552 shares were purchased by this syndicate or pool at a total cost of $50,180,175.30, and the pool continued its operations until April 9, 1929, and during its existence all of said shares were resold by the pool, with a profit of $554,760.42. The average price to the pool and its members was about $800 per unit, the price of the stock having risen during the life of the pool from an interim low of $435 per unit.

XXVIII.

On April 10, 1929, another pool in the stock of the Chase National Bank and Chase Securities Corporation was formed, with Metpotan Securities Corporation, McClure, Jones & Co., Broomhall, Killough & Co., Inc., and Potter & Co. as participants. A letter dated April 10, 1929, from Metpotan Securities Corporation to Broomhall, Killough & Co., Inc., constituting the agreement defining the terms by which said pool was organized, was offered and received in evidence, marked Exhibit A-27, and is hereby expressly made a part of these Findings with like effect as

though fully set out herein. Said pool was managed and controlled by Metpotan Securities Corporation. 12,630 units of $100 par value stock, and 442,934 units of $20 par value stock were bought for $103,216,184.84, the money to effect these purchases being advanced by the Metpotan Securities Corporation and the defendant Chase Securities Corporation. The account was terminated on July 3, 1930, with 38,440 units remaining in the account at an average cost to the participants of $167.85, the market price at that time being $140 per unit. The profit to the pool was $321,250.14.

XXIX.

On July 19, 1929, defendant caused to be formed another pool in Chase units with Dominick & Dominick, as pool managers (Exhibits A-28, A-33, A-34). Dominick & Dominick was a banking house which in 1929 had a stock commission business in the City of New York and held a membership on the New York Stock Exchange. This pool was formed on July 19, 1929, on the basis of an original allotment of 25,000 shares, with full discretionary powers granted to Dominick & Dominick to operate and manage the pool. An option was given by defendant to said pool managers to purchase from it 80,000 shares for the operations of the pool on the following scale of ascending prices:

20,000 shares at $210 per share
10,000 shares at $220 per share
10,000 shares at $225 per share
10,000 shares at $230 per share
10,000 shares at $235 per share
10,000 shares at $240 per share

(Exhibits A-28, A-33).

At the time of the giving of said options, the price of said Chase units was at or below the lowest price specified in said option.

As pool managers, pursuant to agreement with defendant, Dominick & Dominick had the sole management and charge of the entire conduct of the business and affairs of

the pool, with all the usual powers granted to a pool manager, including the right on behalf of the pool to make or procure loans and to pledge the obligations of the pool participants therefor to pay all commissions and expenses of every nature, and on behalf of the pool, to purchase, sell, sell short, repurchase, resell or hold Chase units, in such amounts and at such prices, and in such manner as they might deem advisable, and generally to act in all respects as in their opinion might be to the best interests of the pool; provided, only that the pool at no time was to be short or long, or to be committed for an amount in excess of 25,000 units. In addition to being the managers of the pool, Dominick & Dominick were participants in the profits, along with the other participants in the pool, including defendant. In order to prevent stock which was distributed by the the pool managers to the participants for retail distribution from coming back onto the market so as to interfere with pool sales operations, a penalty of $2 per unit was assessed against any participants for each unit of stock which was repurchased in the market by the pool during the period of the pool at or below the price at which it was originally taken down from the pool by the participants. Dominick & Dominick exercised the option to purchase and purchased from defendant and its affiliate corporations, Chase units in the quantities and at prices specified in the option letters (Exhibits A-28 and A-33) at a profit to the sellers of said Chase units of an amount in excess of one million dollars. The pool ran from July 19, 1929, to November 11, 1929. During that time 172,806 units were bought and 115,483 units were sold. 55,227 units were distributed to the participants. The profits accruing to the pool amounted to $1,452,314.68, and defendant received $261,416.64 as its share of said pool profits.

XXX.

During the year 1928, defendant and its wholly owned subsidiary Metpotan received profits from pool activities in Chase units in the amount of $726,846.01, and received profits from said pool activities in Chase units during the

year 1929 in the amount of $1,801,769.99. The following is a schedule showing purchases and sales by defendant and Metpotan of Chase units in 1928 and 1929:

Chase units (old)	Purchases		Sales	
	Shares	Money	Shares	Money
1928	71,869	$45,973,648.08	70,758	$45,753,743.55
1929	61,106	66,044,849.87	61,623	65,804,381.48
Chase Units (New)				
1929	716,000.6	150,692,148.92	684,709	145,815,916.83
Chase National Bank and Chase Securities Corporation Rights				
1928	74,272	3,942,521.46	74,275	3,942,651.92
1929	67,230.2	9,364,195.29	67,229.2	9,364,125.88

In 1928 and 1929 Chase, through its pools, bought and sold shares and rights involving a total volume of over a half billion dollars.

XXXI.

During the years 1928 and 1929, the defendant itself and through its wholly owned subsidiary and adjunct, the Metpotan Securities Corporation, engaged in pools and trading accounts for the purchase and sale of Chase units on a tremendous scale; that defendant did not disclose to the public, nor to the plaintiff, the existence of any pools and trading accounts in which it was interested nor its participation therein. Neither the plaintiff nor the public generally knew the defendant was using its own resources to finance pools and trading accounts, for the purpose of dealing in its own capital stock. Defendant participated in said pools and the trading accounts through its wholly owned subsidiary, Metpotan Securities Corporation, which was defendant's mere instrumentality and adjunct as a convenience to itself so as to avoid frequent reference to the state of its own surplus account in connection with its participation in said pools and trading accounts. In addition to its participation in said pools, defendant during the years 1928 and 1929, conducted a nation-wide campaign to sell Chase units at retail through its many branch offices located in various cities in the United States. Defendant's sale to plaintiff of said units was made in the course of said

campaign and plaintiff had no knowledge whatever of the existence of said pools, the profits which were being made by defendant, and its wholly owned subsidiary, and the influence which defendant was thereby able to exert on the over-the-counter market for said units, and the price at which said units were sold to the public.

By reason of said pools and defendant's participation therein, an appearance of great interest and activity in the market for said units was created for the purpose of attracting prospective purchasers, and for the purpose of raising the price of said units by concerted activities on its part and that of its associates in the pools.

Defendant and its associates were thereby enabled to unload their holdings of Chase units at a profit, upon the public, which was attracted by the activity of the defendant and its associates, and by information disseminated by them about said units. By the activities of the defendant and its associates, a false and deceptive appearance of genuine demand for the scurities on the part of the purchasing public was created, and plaintiff was induced to purchase said units upon such misleading appearance so fraudulently created. The quoted price of said units at the time of plaintiff's purchase of the same was not a true and genuine price arrived at by lawful and legitimate factors of supply and demand in a free market, but, on the contrary, the market appraisal of said units was wrongfully manipulated and controlled by defendant through the medium of said pools and trading accounts.

XXXII.

Plaintiff did not discover the falsity of defendant's statements and representations or any of them nor did she discover the facts concerning the illegal pool activities of defendant and its associates, nor did she discover the facts concerning the fraudulent and illegal acts of defendant aforesaid, nor any of the facts concealed, withheld and suppressed by defendant as aforesaid, until on or about October 1, 1937, and within six years prior to the commencement of this action, notwithstanding due diligence on her part.

In so far as plaintiff's cause of action is founded on representations knowingly made by defendant, and upon defendant's fraudulent and wilful concealment or suppression of material facts, it is an action for "relief on the ground of fraud" in which case, as provided in Mason's Minnesota Statutes, 1927, Section 9191, the cause of action is not "deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Plaintiff not having discovered the facts constituting defendant's fraud until October 1, 1937, seasonably commenced her action within the time limited by the statutes of the State of Minnesota.

In so far as the provisions of Laws of Minnesota 1941, Chapter 547, Sec. 18 (Mason's Stat. 1927, secs. 3996-24, as amended) are applicable to plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff, the time for assertion thereof or commencement of an action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of the State of Minnesota.

XXXIII.

Promptly upon discovery of the illegality of said sale, and on or about October 11, 1937, plaintiff formally repudiated said transaction and demanded a refund and return to her of the purchase price thereof, with interest, and tendered to defendant her certificates of stock, together with dividends and other income received by plaintiff therefrom, with interest. Defendant rejected said tender and refused to recognize plaintiff's repudiation of said transaction. In her complaint in this action and upon the trial, plaintiff renewed her tender and it was again refused by defendant. Each and all of the tenders so made by plaintiff to defendant were sufficient as a matter of law, but were refused by defendant. It would have been a vain and useless act for plaintiff to make any other or further tenders to defendant, it having clearly indicated to plaintiff that it would refuse any and all such tenders, and plaintiff was under no duty to keep her original tender open, or to

return any dividend checks subsequently received by her. A tender in money of the return of dividends was unnecessary because plaintiff was demanding the return of her purchase money, a much larger sum, and offered to permit defendant to deduct from the amount due plaintiff the amount of any dividends which she had received, with interest.

XXXIV.

Plaintiff from time to time before said discovery, as well as after said tenders and refusals thereof, received and accepted dividends upon said stock as follows:

Dividends on Chase Units:

October 1, 1929	$8.00	
January 1, 1930	8.00	
April 1, 1930	9.00	
July 1, 1930	9.00	
October 1, 1930	9.00	
January 2, 1931	9.00	
April 1, 1931	9.00	
July 1, 1931	9.00	
October 1, 1931	9.00	
January 2, 1932	9.00	
April 1, 1932	6.75	
July 1, 1932	4.50	
October 1, 1932	4.50	
January 2, 1933	4.50	
April 1, 1933	4.50	
July 1, 1933	3.15	
October 1, 1933	2.99	
January 2, 1934	2.99	
April 1, 1934	3.15	
August 1, 1934	4.23	
February 2, 1935	6.30	
August 1, 1935	6.30	
February 1, 1936	6.30	
		$148.16

Dividends on Chase National Bank Stock:

August 1, 1936	$6.30
February 1, 1937	6.30
August 1, 1937	6.30
February 1, 1938	6.30
August 1, 1938	6.30
February 1, 1939	6.30
	$37.80

Dividends on Amerex Holding Corporation Stock:

July 15, 1936	$ .50
February 1, 1937	.50
August 1, 1937	.50
February 1, 1938	.70
August 1, 1938	.70
February 1, 1939	.70
	$3.60

The total of the dividends so received up to and including June 10, 1939, was $189.56.

XXXV.

By reason of the premises, plaintiff has been damaged and defendant is indebted to plaintiff in the amount of $1,828.00, together with interest thereon at the rate of six per cent (6%) per annum from and after August 23, 1939, less credit for said dividends of $189.56, together with interest accrued from the dates of payment thereof.

XXXVI.

Subsequent to the time plaintiff purchased the said Chase units, there were numerous changes in the capitalization of the Bank and of defendant, as set forth in Paragraph XI, sub-division 8 of defendant's answer. Such changes were not confined to the individual shares sold to plaintiff, but affected all of the capital stock of both corporations. The changes resulted from action of the Bank and/or defendant or their respective stockholders in the course of the operation of the Bank or defendant. They could be made without the consent of the owners of any particular shares. Plain-

tiff from time to time was advised of such changes, but she did not actively participate therein, except as she acted as a stockholder before knowledge of defendant's wrongdoing and fraud. The possibility of such change was inherent in the shares at the time of the sale thereof to plaintiff and must be regarded as within the contemplation of the parties at the time.

Such changes in corporate structure in no way estop plaintiff from asserting defendant's wrongdoing; neither plaintiff's incidental and indirect participation in said corporate affairs, nor plaintiff's receipt and acceptance of dividends, constitutes a waiver of such wrongdoing.

XXXVII

Except as hereinbefore specifically found, the Court finds the allegations of defendants Answer not true and not sustained by the evidence, and defendant's motion for amended findings and conclusions of law, and defendant's motion to strike certain items of evidence (as appears from defendant's notice of motion dated May 14, 1941, on file herein) are in all things denied.

As

Conclusions of Law,

the court finds that:

1. Plaintiff is entitled to judgment against defendant in the sum of $1,828.00, plus interest thereon, at the rate of six per cent per annum from August 23, 1929, less the sum of $189.56 (the total of dividends received by plaintiff from defendant), together with interest on each dividend item at the rate of six per cent per annum from the date of receipt thereof by plaintiff (said dividends and dates of receipt thereof by plaintiff are set forth in paragraph XXXIV of the foregoing findings of fact), together with her costs and disbursements herein.

2. Upon satisfaction by defendant of said judgment, plaintiff shall deliver to the clerk of the District Court of Hennepin County, Minnesota, certificate No. 170,762 for 9 shares of common stock in Chase National Bank of the City

of New York, and certificate No. 067,711 for 1 share of common stock in defendant Amerex Holding Corporation, properly endorsed for transfer to defendant, which certificates shall, upon execution of proper receipt therefor, be delivered to defendant; and plaintiff shall, in addition, deliver or pay to said Clerk for delivery and payment to defendant, all dividends received by her on said stock since June 10, 1939, with interest at the rate of six per cent per annum from the date of the receipt thereof by plaintiff.

Let judgment be entered accordingly by the Court.

W. W. BARDWELL, *Judge.*

Dated: June 27, 1942.
Stay of 40 days B.

STATE OF MINNESOTA,
Supreme Court, ss.

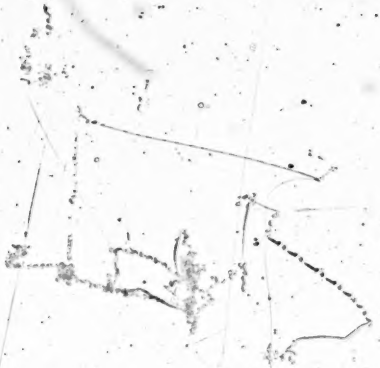
I, Grace Kaercher Davis, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the within paper — writing to which this certificate is attached, with the Findings of Fact, Conclusions of Law and Order for Judgment contained in the original printed record in re *Ruth Chase Donaldson v. Chase Securities Corporation*, a corporation, now known as Amerex Holding Corporation, being #33458 now remaining on file in said action, and that the same is a true and correct copy of said original and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of Saint Paul, Minnesota, May 10, 1944.

GRACE KAERCHER DAVIS,
Clerk of Supreme Court.

[SEAL.]

By ——— ———,
Deputy Clerk.



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FEB 17 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION, *Appellant*,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON, AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS, *Appellees*.

APPEAL FROM SUPREME COURT OF MINNESOTA

BRIEF OF APPELLEES

BENEDICT S. DEINARD,
HYMAN EDELMAN,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Appellees.

T. O. STREISSGUTH,
New Ulm, Minnesota.

GEORGE B. LEONARD,
ARTHUR L. H. STREET,
1036 Andrus Building,
Minneapolis, Minnesota,
Of Counsel.

Hayward Brief Co., 529 So. Seventh St., Minneapolis 15, Minn.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 110

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION, *Appellant*,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON, AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS, *Appellees*.

APPEAL FROM SUPREME COURT OF MINNESOTA.

BRIEF OF APPELLEES

JURISDICTION

Because jurisdiction exists, if at all, under Section 237 (a) of the Judicial Code, to review a judgment upholding the constitutionality of a state statute, we challenge the attempt made by appellant to invoke jurisdiction, in the alternative, under Section 237 (c).

We assert that no substantial federal question is presented and renew our motion to dismiss or affirm (Statement Opposing Jurisdiction, p. 47).

Each of appellant's four points involves a distinct assertion of deprivation of a constitutional right. As will be seen hereinafter in detail, we challenge appellant's right to a review of any of its points, because ground for review was

not seasonably preserved below. As to all four points, we assert that they turn upon matters of local practice which either were not presented to, and passed upon by, the state Supreme Court, or have been conclusively settled by that Court against appellant, and that all the points rest upon such fallacious grounds as to be frivolous.

STATEMENT OF THE CASE

The insufficiency and inaccuracy of appellant's Statement of the Case, particularly as to the nature and scope of the Minnesota Supreme Court's ruling and as to the character of the cause of action sued on, and concerning preservation by appellant of grounds for review in this Court (Appellant's Brief, pp. 4-6), prompt us to provide a clearer approach to the questions presented than appellant furnishes.

General Nature of Questions Presented

The existence and merits of a federal question or questions depend upon the validity of the following assertions by appellant:

1. That Laws of Minnesota, 1941, Ch. 547, Sec. 18, deprive appellant of due process of law and *a vested right* by abrogating what appellant regards as a *final judgment* rendered by the state Supreme Court on the first appeal (Appellant's Brief, p. 13).

We challenge appellant's right to review of this point, because: (a) It was not seasonably presented to, nor decided by, the Minnesota Supreme Court. (b) It turns upon questions of local law not so presented or decided. (c) It turns upon contradiction of well established local law; the interpretation and application of which lie within the exclusive power of the state Supreme Court.

The merits of Point 1 turn upon:

(a) whether plaintiff asserted two or more distinct causes of action, and

(b) whether one of such allegedly separate causes of action was finally adjudicated by the state Supreme Court on the first appeal, so as to give to appellant a vested right in the adjudication, which could not "constitutionally be divested by subsequent legislative act," or by that Court's interpretation and application of such act (Appellant's Brief, p. 17).

Appellant contends that two separate causes of action are involved, and that one of them was finally adjudicated on the first appeal in appellant's favor and thereby was placed beyond constitutional revivor. We assert that there was a mere interlocutory ruling on the first appeal that limitations had not been tolled by appellant's absence from the state, and that there was no inconsistency between that ruling and application of the 1941 law to this case.

2. That the 1941 law deprives appellant of due process of law and *property* by reviving a cause of action that was barred before the statute was enacted (Appellant's Brief, p. 20).

We oppose review of this point because: (a) it depends upon a contradiction of the Minnesota Supreme Court's determination, within the scope of its exclusive powers as to local practice, concerning the nature of this action; (b) appellant fallaciously assumes that the action was necessarily barred when brought; (c) the point is not reviewable because it rests upon grounds not seasonably raised in, or passed upon by, the state Supreme Court.

On the merits, we rely upon the soundness—as well as conclusiveness—of the state Supreme Court's rejection of appellant's contention that plaintiff sued upon a cause of

action created by a statute which conditioned the right upon its enforcement within a time that expired before the action was brought. Appellant seeks a reversal of the state Supreme Court's determination which gave controlling effect to the doctrine of *Campbell vs. Holt*, 115 U. S. 620, holding that barred actions on pecuniary obligations constitutionally can be revived by statute. Appellant asks that that case be overruled, if applicable. We assert that the 1941 law is supported not only by *Campbell vs. Holt*, but by other cases in which this Court has given controlling effect to equitable considerations. Finally, we deny that the cause of action sued on is to be deemed to have been barred, in the absence of any final judgment to that effect and in view of an unreversed finding that fraud practiced by appellant was not discovered until shortly before the action was brought.

3. That the 1941 law deprived appellant of *equal protection* by reversing a rule of law previously established by the Minnesota Supreme Court and by permitting an arbitrary class of litigants to maintain actions already barred (Appellant's Brief, p. 35).

We oppose review of this point, because: (a) It was raised for the first time in appellant's petition for rehearing in the state Supreme Court, which petition was denied without opinion and without ruling. (b) It contradicts the Supreme Court's non-reviewable interpretation of a state statute. (c) It fallaciously assumes that appellant was the beneficiary of a final judgment rendered on the first appeal.

On the merits, the question involves a determination whether the 1941 law makes an unfair, unreasonable or arbitrary classification of actions, as to which the time for suing was extended. We assert that it does not.

4. That appellant has been deprived of the constitutional guaranty of a fair trial through being denied an opportunity to present evidence as to the legislative intent in enacting the 1941 law (Appellant's Brief, p. 40).

We oppose review of this point because: (a) It was first raised in appellant's petition for rehearing which was denied without opinion or ruling. (b) The competency and admissibility of the evidence and the timeliness of its offer relate to matters of local practice and procedure not controllable by this Court.

On the merits, questions arise: (a) Whether the 1941 law lacks such clearness and unambiguity on its face as to make any extraneous evidence as to legislative intent admissible? (b) Whether appellant offered any competent evidence as to such intent? We assert that these questions should be answered negatively.

Grounds of Plaintiff's Cause of Action

This action in tort was brought by appellees' decedent to recover as damages the purchase price of eight shares of the capital stock of the Chase National Bank of New York and eight shares in the Bank's securities affiliate, sold to decedent by appellant, August 10, 1929 (R. 1-11; R. 402-403, f. 1818).

The sale antedated Act of Congress, June 16, 1933 (12 U. S. C. A., Sec. 377), which required divorcement of the Bank from its affiliate. When sold the two stocks were inextricably linked together, ownership being evidenced by a single, indivisible receipt issued by the Bankers Trust Co., as depository. Neither the Bank shares nor the affiliate shares were transferable without simultaneous transfer of the other. The combined shares were quoted and sold as units, and are hereinafter referred to as "Chase units"* (R. 296,

*For a complete history of the intercorporate structure of the Bank and its affiliate, see Part 5 (1933) and Part 6 (1934) of "Hearings before the Committee on Banking and Currency, U. S. Senate, 73rd Congress, 1st Session on S. Res. 84 (72nd Congress) and S. Res. 56 (73rd Congress)" relating to "Chase Securities Corporation" and entitled "Stock Exchange Practices," particularly pages 2280-2299 of Part 5. An authenticated copy of Part 5 is in the record as Plaintiff's Exhibit A-56, admitted in evidence (R. 231-235) but not shown by the printed record.

300, Findings II-VI; R. 402-403, ff. 1818-1819).

The complaint, stating a single cause of action upon a single sale, seeks single recovery upon four separate grounds:

1. Illegal sale by appellant to plaintiff of unregistered stock, through an unlicensed salesman, in violation of the Minnesota Securities Act (hereinafter referred to as the "Blue Sky Law"), rendering the sale void and appellant liable for repayment of the purchase price (R. 2-7). Registration of the stock was required because appellant was an investment corporation and not a bank. (See *Commissioner of Securities vs. Chase Securities Corp.*, 298 Mass. 285; appealed dismissed, 302 U. S. 660.) (Illegality of the sale is conclusively established by the decision of the Minnesota Supreme Court now under review (R. 404-405, f. 1821; R. 409).)

2. Appellant's sale to plaintiff implied a representation that the stock had been registered and that its agents were licensed, as required by the Blue Sky Law, and that the sale was lawful. The representation being knowingly false, appellant is liable on the ground of fraud. (*Mary Pickford vs. Bayly Bros.*, 12 Cal. (2d) 501, 86 Pac. (2d) 102.)

3. Extensive fraudulent pool operations and other illegal manipulation of the "over-the-counter" market in Chase units, engaged in by appellant and its officers, affecting the ostensible market price of the stock sold to plaintiff "at the market" (implying a sale unaffected by market manipulation). (As to the general nature and effect of this species of wrongful practice, see *Otis & Co. vs. Securities and Exchange Comm.* (C. C. A. 6), 106 F. (2d), 579, 583, Point 4.)

4. Appellant's wilful concealment of (a) nonregistration of its stock, (b) nonlicensing of its salesmen, and (c) its pool operations and market manipulations constituted actionable deceit. (As illustrating the general basis of plaintiff's reliance on this phase, see *Strong vs. Repide*, 213 U. S. 419, and *Stewart vs. Wyoming Cattle Ranche Co.*, 128 U. S. 383.)

Chronology of Proceedings

The action was commenced in October, 1937, and was tried in the state District Court in May and June, 1939 (R. 244-245, f. 1061).

While this case was pending in the trial court, the Circuit Court of Appeals, Eighth Circuit, decided two related cases in favor of the respective plaintiffs, holding that there had been violations of the Blue Sky Law by the respective defendants, one of whom was appellant, and that limitations had been tolled by the defendants' absence from Minnesota. In neither case did the Court find it necessary to pass upon the fraud issues which also had been found in favor of the respective plaintiffs by the United States District Court for Minnesota.

City Co. of New York vs. Stern (C. C. A. 8), 110 F. (2d) 601, affirming

Stern vs. National City Co. (D. C., Minn.), 25 F. Supp. 948.

Chase Securities Corp. vs. Vogel (C. C. A. 8), 110 F. (2d) 607.

See, also, *Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, where it was finally adjudged without appeal that a sale of unregistered stock constituted fraud and that limitations did not commence to run until the fraud was discovered.

April 18, 1940, the state District Court, in this case, like the Circuit Court of Appeals in the *Stern and Vogel cases, supra,* decided that there was a sale in violation of the Blue Sky Law and that limitations were tolled by appellant's absence from the state, and therefore found it unnecessary to pass on the fraud issues (R. 258, Finding XXVI).

January 10, 1941, the Minnesota Supreme Court, by a four-

to three decision, reversed the judgment of the trial court *on the sole ground that limitations had not been tolled by appellant's absence from the state*, and remanded the case *without prejudice to further proceedings on "issues other than that of the tolling of the statute of limitations"* (R. 362-363, f. 1766; 209 Minn. 166).

March 31, 1941, this Court granted certiorari in the *Stern and Vogel cases, supra*, and remanded them to the Circuit Court of Appeals "for further proceedings with respect to *any question not determined by the Supreme Court of Minnesota* in the Pomeroy and Donaldson cases" (312 U. S. 666); mentiling the case at bar and a companion case, on the authority of which the ruling on the first appeal herein was made.

The *Stern case, supra*, has been disposed of by stipulation, but the *Vogel case, supra*, remains abeyant in the Circuit Court of Appeals, pending final determination of the case at bar.

This case having reached the trial court, on remand after the first appeal, appellees on *April 9, 1941*, moved for a determination of the fraud issues (R. 244-259).

April 28, 1941, and effective July 1, 1941, the statute the validity of which this Court is now called upon by appellant to determine, became a law (Laws of Minnesota, 1941, Chap. 547, Sec. 18; *Minnesota Statutes, 1941*, Sec. 80.26). (Like appellant, we hereinafter refer to it as the "1941 law.") The statute is part of an act that amended the Blue Sky Law in many particulars not here involved. We quote the text of Section 18 hereinafter. In substance, the section requires actions of this kind, so far as based upon violations of the Blue Sky Law, to be brought within six years after the date of delivery of the stock; "*provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may*

be brought within a period of one year following such effective date."

May 14, 1941, appellant moved for findings, etc., in its favor, on the theory that the action was grounded upon violation of the Blue Sky Law, that the action was barred, and that there was no proof of fraud (R. 287-294).

May 16, 1941, plaintiff moved for supplemental findings, etc., with respect to the applicability of the 1941 law (R. 285-286).

June 27, 1942, the trial court made its first determination in the case after the cause had been remanded on the first appeal. The Court found for plaintiff on all of the grounds of recovery set up in the complaint, as hereinbefore summarized (R. 295-317); specifically finding on the *merits*: (1) That plaintiff was entitled to recover in tort on the ground of an illegal sale to plaintiff (R. 306-307, Finding XXI). (2) That the sale to plaintiff implied a representation that there had been compliance with the Blue Sky Law (R. 303-304, Finding XV). (3) That appellant knew that the law required registration of the stock and wilfully failed to register (R. 305-306, Finding XIX). (4) That appellant, associated with others, engaged in pool operations whereby the market price of the Chase units was manipulated and controlled and the public was deceptively induced to buy (R. 308-313, Findings XXVI-XXXI). (5) That appellant knew that an application to register the stock would necessitate revelation of the facts concerning the pooling operations, etc. (R. 305-306, Finding XIX). (6) That appellant misrepresented to plaintiff that there was a free, uncontrolled and unmanipulated market for the stock (R. 304, Finding XVI; R. 307, Finding XXII). (7) That appellant concealed nonregistration of the stock, nonlicensing of its salesmen and the market manipulations (R. 304-305, Findings XVII, XVIII; R. 313, Finding XXXII). As to *limita-*

tions, the trial court found: (1) That plaintiff did not discover any of the fraud aspects covered by the findings above summarized until on or about October 1, 1937, shortly before this action was begun (R. 313-314, Findings XXXII, XXXIII). (2) That so far as the 1941 law applies to "plaintiff's cause of action, or any of the separate grounds for relief asserted by plaintiff" the time for suing was extended by that law to July 1, 1942, and the action was brought "within the time limited by the statutes of the state" (R. 313-314, Finding XXXIV).

After denial of appellant's motion for amended findings, etc. (R. 351), and on *November 25, 1942*, judgment for plaintiff was entered, awarding recovery of a single sum, with costs and disbursements (R. 351-352).

The same day appellant appealed to the Minnesota Supreme Court from the judgment, and on December 31, 1943, that Court affirmed the judgment (R. 401, 409; 216 Minn. 269, 278).* The Court decided:

(1) "The action was brought in tort to recover as damages the purchase price of unregistered securities sold in Minnesota," etc. (R. 402, f. 1818; 216 Minn. 270).

(2) It was unnecessary to pass on the deceit aspects (R. 403, f. 1818; 216 Minn. 270-271).

(3) The Blue Sky Law clearly required the securities to be registered (R. 404, ff. 1820-1821).

(4) "Since the stock was not registered the plaintiff is entitled to recover the purchase price unless barred by the statute of limitations" (R. 404-405, par. 2; 216 Minn. 273).

(5) The 1941 law "authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date

*During the pendency of the appeal to the Minnesota Supreme Court, the plaintiff died, and appellees, executors of her estate, were substituted as respondents.

of the section, whether more than six years had elapsed since delivery or not" (R. 405, par. 3; 216 Minn. 273). The Court concluded: "We regard the proviso here under consideration as lifting the bar of the general six-year limitation" (R. 406, f. 1822; 216 Minn. 274).

(6) "By lifting the bar of the statute as applied to this case," the legislature did not violate "the due process clauses of the state and federal constitutions" (R. 406, par. 4; 216 Minn. 274; R. 408, f. 1825; 216 Minn. 277).

(7) The 1944 law applies to cases pending when the law was enacted (R. 408-409, par. 5; 216 Minn. 277).

The companion case, disposed of by the Minnesota Supreme Court at the same time and for the same reason (*Bain vs. National City Co.*, 216 Minn. 278, frequently referred to as the "Pomeroy Case") was not appealed. The case at bar comes before this Court under an order allowing an appeal, filed in the Minnesota Supreme Court, April 22, 1944 (R. 475-481).

Appellant's Position Summarized

An analysis of appellant's brief shows that, to support its claim under Point 1, that the judgment appealed from deprives appellant of a vested right acquired under a supposedly final judgment rendered on the first appeal to the Minnesota Supreme Court, reliance is placed upon assumption: (1) That plaintiff sued on *two separate causes of action*, one based upon violation of the Blue Sky Law, the other upon common law fraud. (2) That the Minnesota Supreme Court decided on the first appeal that the first cause of action *was barred by limitations*. (3) That the decision on the first appeal amounted to a *final judgment*, *res judicata*, precluding its disturbance by any subsequently enacted statute or by any later decision by the Supreme Court in this, *the same*, case (Appellant's Brief, p. 13).

Appellant's Point 2 rests upon assumption that the 1941 law revived a *cause of action that had been barred*—a supposedly *separate cause of action based upon statutory violation*—and that appellant was thereby deprived of *property* (Appellant's Brief, p. 20).

Appellant's Point 3 rests upon the assumption that the 1941 law was specifically enacted to *reverse a rule of law previously settled in appellant's favor*, so as to allow maintenance of actions *already barred* (Appellant's Brief, p. 35).

Appellant's Point 4 rests upon the assumption that appellant was denied the opportunity of offering evidence to contradict the state Supreme Court's determination as to what the legislature intended in enacting the 1941 law (Appellant's Brief, p. 40).

Therefore, we proceed with a discussion of the nature of this action, whether involving one or more than one cause of action; as to what the state Supreme Court really decided on the first appeal; as to what rights, if any, appellant thereby acquired; as to whether this action was barred when it was brought; and as to what interpretation the Supreme Court really placed upon the 1941 law. In addition, we state facts of the case bearing upon the right of appellant to have its various contentions reviewed by this Court.

Character of Cause of Action

Contrary to an intimation in appellant's brief (top p. 5), the complaint (R. 4-10) states a single cause of action, counting on fraud and nonregistration of the securities sold, contrary to the Blue Sky Law, as inhering in the single tortious sale.

Far from raising any claim that two causes of action were stated in the complaint, the answer treated it as stating but one, based upon a single transaction. Par. XI averred:

"* * * Defendant alleges:

"1. That the *transaction* giving rise to plaintiff's alleged *cause of action* arose out of a *transaction*," etc. (R. 16).

"5. Alleges that plaintiff's *cause of action*, if any, did not accrue within six years * * * and *is* barred." etc. (R. 18).

When the trial opened appellant took a position that clearly negatived any claim or conception that the pleading of both statutory violation and fraud stated separate causes of action. Counsel did ask that plaintiff be compelled to elect between "*two inconsistent* causes of action," one charging defendant with breach of fiduciary duty *as plaintiff's agent* in buying the stock for her *and one charging defendant as seller to plaintiff* (R. 25). Appellant, by challenging the complaint as stating two causes of action, solely because it charged appellant in dual capacities, recognized that the complaint was not to be regarded, on any other theory, as stating more than one cause of action. At the same time, plaintiff conceded in open court that reliance was placed "mainly upon the relationship of seller and buyer between the parties." Thereupon counsel for appellant acquiesced in the trial judge's observation that plaintiff's concession *disposed of appellant's contention that two causes of action were involved*, and in the observation that there remained to be tried but two issues growing out of the sale—fraud and nonregistration (R. 33-34, f. 96). See also, R. 151, f. 269, where appellant's counsel referred to the foundation of plaintiff's "cause of action."

Appellees rely upon the above recited proceedings as constituting a binding stipulation in open court that the action involved but a single cause of action.

There is nothing in the subsequent proceedings below that laid ground for review of appellant's present contention that two separate causes of action are involved.

On the second hearing in the trial court, appellant did ask for amended findings in which reference was made to a cause of action based on statutory liability and a cause of action based on fraud (R. 292, par. 17 (a)-(c); R. 293-294, pars. 1, 2, 4). But there was no request for any finding or conclusion of law that separate causes of action were involved. Nor did any such request accompany appellant's later motion to amend the trial court's final findings. That motion proceeded upon a theory that the evidence established but a single cause of action, based upon statutory violation (R. 326, par. (b); R. 328, par. 4; R. 348, par. 3). In the same motion, appellant intimated recognition that but one cause of action was presented, by asserting "That *the transaction* giving rise to plaintiff's *cause of action* was not * * * consummated in Minnesota," etc. (R. 329, par. 9).

The assignments of error presented to the Minnesota Supreme Court on the second appeal (R. 364-400) raised no question as to the number of causes of action involved, as to the nature of the determination made by the Supreme Court on the first appeal, or as to the nature of any right acquired by appellant under that determination, although Subdivision D of the assignments was devoted to "the Nature of Action," etc. (R. 384-386). The assignments selected for presentation in the appellant's separately printed Jurisdictional Statement (Appendix H, pp. 48-49) disclose no attempt to raise those questions in the state Supreme Court. Nor is there anything in the opinion of the Supreme Court (R. 401-409; 216 Minn. 269-278) to show that any of the questions were raised or passed upon in the Supreme Court. Not until its petition for rehearing (R. 410, *et seq.*), which was denied without opinion or ruling (R. 474, f. 1936), did appellant distinctly raise any question of final judgment or vested rights (R. 414, *et seq.*). Even then appellant insisted that there was but one cause of action in the case, based upon

statutory violation (R. 413-414, par. IV).

Nature of Determination on First Appeal

As to the scope and effect of the determination on the first appeal, we accept as an accurate statement, the recital by appellant in its Petition for Rehearing in the state Supreme Court, that the first appeal "*decided only the tolling question*" (R. 413, par. 4).

As hereinbefore shown, the case went to the state Supreme Court on the first appeal, with reservation by the trial court of determination of fraud issues, and the Supreme Court did not determine anything but that limitations *had not been tolled by appellant's absence from the state* (R. 353, syl. 4; R. 362, f. 1766; 209 Minn. 155, 166):

Specifically, the Supreme Court's opinion read:

> "Our decision in a companion case [the Pomeroy case] * * * is decisive of the only question presented by this appeal and requires reversal of the order under review.
>
> "This record indicates the presence of issues *other than that of the tolling of the statute of limitations.* If, in respect to such issues, there are further proceedings below, this decision is without prejudice to them or the result" (R. 362-363, f. 1766). (Italics supplied.)

That is the determination to which appellant repeatedly refers in its brief as a *final judgment* that became *res judicata* on the point that this action was *barred by limitations* and thereby gave appellant *vested property.*

Subsequent Proceedings

What happened, in the light of the 1941 law, in the trial court after remand of the case on the first appeal, and in the Supreme Court on the second appeal, is detailed hereinbefore under the subheading, "Chronology of Proceedings."

Minnesota Statutes Involved

When this action was brought Minnesota's general statutes of limitation contained these provisions:

> "9191. *Various cases*, six years—The following actions shall be commenced within six years:
>
> "1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.
>
> "2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.
>
> * * * * * * * * * *
>
> "6. For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." (*Mason's Minn. Stats., 1927*, Sec. 9191.)

Appellant now asserts that this action involves two distinct causes of action, one governed by clause 2 as counting on a "liability created by statute," and a separate cause of action for fraud, controlled by clause 6. Appellant says that the ruling on the first appeal conclusively shows that this action is barred as having been brought under clause 2 more than six years after appellant made the illegal sale of stock to plaintiff.

On the other hand, we assert that the single sale of a single block of stock resulting in single damage did not give rise to two distinct causes of action merely because appellant's acts were doubly wrongful, but rather to a single cause of action which could never be regarded as barred until a final determination to that effect; that, prior to the enactment of the 1941 law there had been no determination in this case beyond a mere interlocutory ruling that limitations had not been tolled by appellant's absence from the state; that, therefore, there was no possible constitutional bar to the legislature enacting an amendatory law under which the action must be

deemed to have been brought in time.

But even if we should concede, *arguendo*, that there were two separate causes of action; and that, at the time of the enactment of the 1941 law, limitations had run as to the so-called "statutory cause of action," appellant would still be in error; because

(1) The Minnesota limitation statute prior to 1941, being a general one, did not affect the right, but only the *remedy*, for the enforcement of an otherwise incontestable obligation to repay money.

In re Daniel's Estate, 208 Minn. 420.

The defense of limitations, when it affects the remedy only, does not constitute a vested right.

Campbell vs. Holt, 115 U. S. 620.

(2) Even the entry of a final judgment could not convert a defense of limitations into a vested right immune from retroactive legislation.

West Side Belt R. Co. vs. Pittsburgh Const. Co., 219 U. S. 92.

(3) Strong equitable considerations justified the enactment of the 1941 law and support its validity, aside from *Campbell vs. Holt, supra*.

Robinson vs. Robins Dry Dock & Repair Co., 238 N. Y. 271.

(4) The obligation did not rest upon a statute which conditioned the right upon its enforcement within a specified time.

(5) There being no question as to appellant's liability,

"This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached."

Graham vs. Goodcell, 282 U. S. 409.

This is the text of the 1941 law so far as here material (Laws of Minnesota, 1941, Chap. 547, Sec. 18; *Minn. Stats., 1941*, Sec. 80.26):

"No action shall be maintained * * * upon a sale of securities made in violation of * * * this act, *or* upon a

sale of securities made in violation of the provisions of a registration thereof, *or* for failure to disclose that the sale * * * was made in violation * * * of this act or * * * the provisions of registration, * * * *or* upon any representation with respect to the registration or nonregistration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser, * * * *provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within one year following such effective date.*" (Italics supplied.)

The State Supreme Court's Interpretation of the 1941 Law

In lieu of an accurate statement of what the Supreme Court decided, concerning the scope and meaning of the 1941 law immediately above quoted, appellant's brief (p. 4) substitutes a misleading version. What the Supreme Court actually declared speaks for itself. After quoting the essential provisions of the statute (R. 404, f. 1820), the Court said, so far as concerns its interpretation of the statute, as distinguished from its conception of circumstances that influenced the legislature to enact the statute:

> "The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made more than five years before the effective date of the limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years *and less than six years* shall have elapsed,' etc." (The Court supplied the italics.) (R. 405, f. 1821; 216 Minn. 273.)
>
> "* * * If the clause in the proviso relating to causes arising more than five years previously were to be interpreted as defendant contends, it would apply to few, if any, cases. Causes of action for such violations were not distinguished from those in deceit which under

> the prior law may or may not have accrued more than six years prior to the effective date of the act. * * * We regard the proviso here under consideration as lifting the bar of the general six-year limitation" (R. 405-406, f. 1822; 216 Minn. 274).

As will be seen in our argument under our Points II and III, *post*, appellant is not supported in its claim (p. 37) that the Supreme Court construed the 1941 law as being directed against appellant and the National City Company only.

Contentions Not Timely Raised

Appellant's Statement of the Case tends to mislead in its recital (p. 4) that the Minnesota Supreme Court's decision and judgment "were entered over appellant's contentions that the statute, as so construed * * * constituted unreasonable class legislation in violation of the equal protection clause; and that appellant had been denied a fair trial, contrary to due process, on the issue of legislative intent."

Appellant did contend that the 1941 law violated the Due Process Clause (R. 406, f. 1822; 216 Minn. 274) and the Court explicitly overruled that contention (R. 408, f. 1825; 216 Minn. 277). But it does not appear from the state Supreme Court's opinion or otherwise that the claim of denial of due process was presented to that Court, prior to the petition for rehearing, on any contention that more than one cause of action was stated in the complaint, that there had been a final judgment on one cause of action, that appellant had a supposed vested right in the judgment, etc. No contention that the statute violated the Equal Protection Clause, or that appellant unconstitutionally had been denied a fair trial on the issue of legislative intent, was raised until appellant petitioned for rehearing (R. 412-413, ff. 1840-1841; R. 414, f. 1842). Appellant's brief (p. 10) is inaccurate so far

as it intimates that in its petition for rehearing appellant "*again*" contended that the statute violated the Equal Protection Clause and that appellant unconstitutionally had been denied a trial on the issue of legislative intent.

Appellant correctly states (p. 10) that the petition for rehearing was denied "without opinion" (R. 474, f. 1936). Therefore, there was no ruling or decision upon any of the numerous contentions advanced by appellant in the petition for rehearing (R. 440-457, ff. 1836-1905).

Other Inaccuracies Listed

Without here attempting to list every inaccuracy in appellant's Statement of the Case, we do feel that a proper approach to the argument requires correction of recitals at the following mentioned pages of appellant's brief:

p. 5. An intimation that the case was tried below as involving two causes of action is inaccurate, as hereinbefore shown.*

p. 6. The summary of what was decided on the first appeal in this case is misleading in its intimation that the decision foreclosed further determination excepting as to appellees' rights under a supposedly separate cause of action for fraud. As shown by the decision (R. 362-363, f. 1766), by the judgment (R. 363, f. 1767), and by the mandate (R. 275-277, ff. 1098-1101) the only final judgment rendered was one for costs. The orders appealed from were merely reversed and the case remanded to the trial court for further proceedings on "issues other than that of the *tolling* of the statute of limitations," as to which the decision was declared to be "without prejudice to them or the result" (R. 362-363, f. 1766). It will be seen that appellant errs in saying (p. 6) that in remanding the case, the Supreme Court explicitly limited the trial court to a "determination of the remaining issue of fraud."

*That this contention is an afterthought is indicated by appellant's substitution of "causes of action" in its brief for "grounds" or "issues" wherever those words appear in its Jurisdictional Statement.

SUMMARY OF ARGUMENT

Appellant presents no reviewable question as to any of its four principal points, because: (1) The grounds upon which the points argued rest are not shown to have been seasonably advanced in the state Supreme Court. (2) The grounds upon which each point rests relate to matters of well-settled local law and practice, as to which the conclusions of the Minnesota Supreme Court are not reviewable. (3) The mere statement by appellant of each point shows that it is so lacking in merit on its face as to be frivolous.

Point 1

Appellant's contention (Point 1, p. 13) that the 1941 law, as construed and applied, deprives it of a vested right without due process, depends entirely upon the nature of the determination made by the Minnesota Supreme Court on the first appeal in this case. Appellant claims that that determination was a *final judgment* in appellant's favor and became *property* of which it could not be divested. That contention, in turn, rests upon an assumption that plaintiff sued on two separate causes of action—one statutory and one common-law. Appellant says that the first cause of action was eliminated from the case by a supposed determination on the first appeal that it was *barred*, leaving only a common-law fraud action to be passed upon.

Before coming to the merits of this point, we draw attention to these facts: Appellant never presented to the state Supreme Court any of the contentions involved in its Point 1, nor were any of them passed upon by that Court. Appellant never asked the Supreme Court to determine the nature of the ruling on the first appeal, or whether the case involved two separate causes of action, or to decide that the ruling on

the first appeal gave appellant property or vested right, or that the subsequent judgment of the trial court rested upon a cause of action that previously had been finally adjudged to be barred. No question of constitutional right as to this aspect of the case was raised. The assignments of error presented to the Supreme Court (R. 361-490) raised no such questions.

On the merits, we contend that the case presents a single cause of action for wrongful sale to the plaintiff of a single block of stock as one entire transaction, grounded upon doubly wrongful conduct that combined to induce the single purchase—violation of the Blue Sky Law and common-law fraud. The Supreme Court on the first appeal merely made an *interlocutory ruling* that limitations had not been tolled by appellant's absence from the state. That ruling was, at most, law of the case which did not stand in the way of a subsequent ruling that limitations had not run for another reason. The Court bindingly decided that this action is in tort and not on a statutory liability.

Point II

Appellant's contention (Point 2, p. 20) that the 1941 law deprives it of *property* without due process depends upon the fallacious premises: (1) That, *contrary to the state Supreme Court's explicit interpretation of Minnesota statutes*, this is an action on a liability created by a statute which made limitations a part of the right, thereby precluding constitutional lifting of the bar retroactively. (2) That plaintiff's cause of action necessarily was barred before the action was brought. (3) That appellant's right to plead the supposed bar was "property." (4) That *Campbell vs. Holt*, 115 U. S. 620, does not apply, but, if applicable, should be overruled by this Court.

As to jurisdiction of this Court to review appellant's Point 2, we contend that except as the Minnesota Supreme Court's opinion shows on its face the scope of the constitutional question passed upon by that Court, nothing is presented for review. The opinion conclusively rejected appellant's contention that this is an action on statutory liability. There is nothing in the Record to indicate that, prior to filing of appellant's petition for rehearing, which was denied without opinion or ruling, appellant ever specified wherein it had acquired property that was divested by the 1911 law or why it must be considered that plaintiff's cause of action was barred before the law was enacted. Appellant's assignments of error in the Minnesota Supreme Court (R. 364-400) did not even raise any general claim of deprivation of due process.

On the merits, our position is: (1) The state Supreme Court's decision that this is not an action on statutory liability is sound and controlling. (2) It does not appear that plaintiff's cause of action ever was barred. (3) No judicial determination in this case ever finally adjudged anything in appellant's favor or conferred any property right upon appellant. (4) Even if the action was barred before the 1911 law was enacted, the bar constitutionally was lifted under the well-established doctrine of the *Campbell Case*, *supra*, and other cases decided by this Court. None of those cases involved stronger equitable considerations favoring lifting of a statutory bar than does this case. (5) Appellant does not establish its contention that the doctrine of *Campbell vs. Holt* should be overruled.

Point III

Appellant does not substantiate its contention (Point 3, p. 35) that the 1941 law, as construed and applied by the Minnesota Supreme Court, violates the Equal Protection Clause. The contention in substance is a mere restatement of appellant's Points 1 and 2, substituting an assertion of denial of equal protection for denial of due process. It reiterates the claim that the 1941 law, as interpreted and applied, deprives appellant of a supposed property right in a supposed final judgment that never existed.

The point is not reviewable because not seasonably raised in the state Supreme Court, having been advanced for the first time in the petition for rehearing which was denied without opinion or ruling.

On the merits, we argue that, as plainly worded and broadly interpreted by the Minnesota Supreme Court, the 1941 law operates impartially upon all litigants falling within a just and reasonable classification.

Point IV

Appellant contends (Point 4, p. 40) that the Minnesota Supreme Court denied appellant a fair trial by refusing to reopen the case after it had been decided, to enable appellant to offer certain incompetent and inadmissible evidence concerning the legislature's intention in enacting the 1941 law. The point is based upon a statement in the Court's opinion of circumstances which might have induced the enactment.

Appellant fails to distinguish between the state Supreme Court's *interpretation* of the 1941 law, according to the clear and unambiguous *wording of the statute*, and mere casual observation by the Court as to circumstances which may have influenced the legislature.

The contention was first raised by petition for rehearing in the Supreme Court after the case had been decided, and the petition was denied without opinion or ruling. Therefore, the point is not reviewable now. Should we concede, *arguendo*, that legislative intent was a matter upon which the parties were entitled to submit extraneous evidence, the fact would still remain that legislative intent became an issue in the case on May 16, 1941, when plaintiff moved for supplemental findings as to the 1941 law. That was more than a year before the case was finally decided by the trial court, and long before appellant took its second appeal to the state Supreme Court. So, appellant furnishes no valid excuse for delay in raising the point.

But, on the merits, we contend that the Supreme Court did not err in disregarding appellant's offer of proof, because no extraneous evidence was admissible to contradict the legislative intent found by that Court to have existed by reason of the plain wording of the statute. Furthermore, if extraneous evidence had been admissible that offered by appellant was incompetent because it consisted of mere affidavits of two legislators and a state official and of legislative journals and legislative committee reports, all offered to show that there was "no affirmative evidence of intention to revive barred causes of action" (Appellant's Brief, pp. 42-43). We regard appellant's Point 4 as being so frivolous on its face as to be nonreviewable by this Court, apart from the fact that it was not seasonably raised.

ARGUMENT AND AUTHORITIES

I.

Appellant's Contention, That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Deprives Appellant of a Vested Right Without Due Process of Law, Is Not Reviewable and Is So Lacking in Merit as to Be Frivolous.

(See Appellant's Brief, p. 13.)

As shown by the first three paragraphs of appellant's argument under its Point 1 (pp. 13-14) that point rests entirely upon these fallacious subsidiary contentions: (1) That the state Supreme Court's determination on the first appeal was a *final judgment* determining that, so far as plaintiff's claim was grounded upon appellant's illegal sale to her of unregistered stock, the *action was barred*, and nothing remained to be adjudicated in the case excepting issues as to common-law fraud. That the judgment was "*property*" of appellant. (2) That there were two distinct causes of action involved—one *statutory* and one *common-law*—and the determination on the first appeal disposed of the first, leaving only the second, limited to a fraud theory, to be decided.

If the determination on the first appeal, *that limitations were not tolled by appellant's absence from the state*, and the remand of the case to the trial court for trial "*of issues other than that of the tolling of the statute of limitations*," as to which the decision was declared to be "*without prejudice to them or to the result*" (R. 362, 363, f. 1766) was *not a final judgment that the action was barred*, appellant's Point 1 collapses. Likewise it collapses if the action presents a single cause of action for a single tort, because then in no view of the case could the determination on the first appeal be regarded as a final judgment. Furthermore, the point must

fail on this Court deciding that it ~~cannot~~ or will not disturb the Minnesota Supreme Court's determination on the second appeal that the case was "pending" when the 1941 law was enacted (R. 408-409).

A.

Appellant's Point 1 Is Not Reviewable.

Appellant's contentions under this head are not reviewable, because: (1) They were not seasonably presented to, or decided by, the Minnesota Supreme Court. (2) They turn upon contradiction of well-established local law and practice, the interpretation and application of which lie within the exclusive power of the state Supreme Court.

(1) Not Seasonably Presented.

Appellant makes no pretense that its contentions now under discussion were presented to the Minnesota Supreme Court, excepting in a petition for rehearing filed after the Court had decided the case (R. 438-440, Subd. III). It is conceded that that petition was denied without opinion and without ruling (R. 474, f. 1936). In short, appellant did not seasonably call upon the Court, by assignment of error or otherwise, to determine the character of the ruling made on the first appeal, or to adjudge that it amounted to a *final judgment* that part of the action was barred, or to declare that appellant acquired *property* in the ruling on the first appeal of which it could not be divested under the doctrine of *res judicata* or under the Due Process Clause.

The opinion of the Minnesota Supreme Court here under review does not disclose that it passed upon, or was called to pass upon, any constitutional question depending upon the nature of the ruling made on the first appeal. That opin-

ion does contain this passage concerning the 1941 law: "Does the proviso apply to cases already *pending?* We think it does, even though it was passed subsequent to a determination by this Court that the cause was barred" (R. 408-409). (For reasons to be shown hereinafter, in discussing the nature of the ruling on the first appeal, the quoted statement by the Court is not to be regarded as an adjudication that the action was barred before the 1941 law was enacted.)

In presenting the contentions now under consideration appellant overlooks the—

> "cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides."
>
> *Busby vs. Electric Utilities Employees* (Dec. 4, 1944), 89 L. Ed. 109, 7 Adv.

> "We have often had occasion to point out * * * that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review."
>
> *Huddleston vs. Dwyer*, 322 U. S. 232.

Because no question concerning finality of the decision rendered on the first appeal, or as to appellant having any property in the decision, was raised by assignment of error in the state Supreme Court or passed upon by that Court, and there is no showing that the questions otherwise were seasonably raised in that Court, they are not open to consideration in this Court.

Hulbert vs. City of Chicago, 202 U. S. 275, 281.

Questions not presented to the Minnesota Supreme Court by assignments of error or brief will not be considered by that Court, even if they were presented by motion for new trial in the lower court.

Peterson vs. Pete-Erickson Co., 186 Minn. 583, 585.

Minnesota Supreme Court Rule VIII (3, 4), 212 Minn. xli-xlii.

To give this Court jurisdiction of a state judgment, it must appear on the record, not only that a federal question was presented to the highest court of the state for decision, but that it was decided, *or that its decision was necessary to the judgment rendered.*

Chouteau vs. Gibson, 111 U. S. 200, 201.

This Court declines to pass upon a contention that an appellant has been deprived of property without due process of law until the existence of the property is first established.

City of New Orleans vs. New Orleans Water Works Co., 142 U. S. 79.

May 16, 1941, appellant was notified (R. 285-286) that plaintiff relied upon the 1941 law as establishing the timeliness of the action, and appellant was thereby apprised that plaintiff would insist that the determination on the first appeal did not stand in the way of a final adjudication in plaintiff's favor on all of the issues in the case, excepting the issue settled on the first appeal, namely, that appellant's absence from the state did not toll limitations.

It thus conclusively appears that this is not a case where appellant could not have anticipated application of a particular statute to the case until after rendition of a decision by the state's highest Court, and therefore, properly could challenge the validity of the statute for the first time by petition for rehearing. (*Ogsbury vs. Georgia*, 295 U. S. 111, 113-114.)

The procedure that appellant should have followed if it intended to preserve a constitutional question for review in this Court is indicated in *Schuylkill Trust Co. vs. Pennsylvania*, 296 U. S. 113, where the facts upon which asserted unconstitutional discrimination was claimed to exist were subject to specific requests for conclusions of law in the trial court, specific assignments of error in the state Supreme Court, etc.

Because the contentions underlying Point 1 were raised for the first time in a petition for rehearing which was denied without opinion and without ruling upon any of the numerous contentions advanced in it, those contentions are not now reviewable.

Godchaux Co. vs. Estopinal, 251 U. S. 179, 181;
American Surety Co. vs. Baldwin, 287 U. S. 156, 163.

In passing, it is to be noted that even in the appellant's petition for rehearing, counsel's thoughts were not coherent as to the nature and effect of the state Supreme Court's ruling on the first appeal. In Subdivision III of the petition, attempt was made to convince the Court that it had decided on the first appeal, as a "total and final determination" that the *action was barred*, so far as counting on statutory violation (R. 138). But, earlier in the petition (p. 113, par. 4) appellant declared that *the only thing decided on the first appeal was the tolling question.*

(2) Appellant Contradicts the Conclusions of the State Supreme Court on Matters of Local Law and Practice, as to Which That Court Has the Last Say.

Contradicting the statement by the state Supreme Court quoted above, that this action was still "pending" when the 1941 law became effective, yet recognizing that the Court did not regard the ruling on the first appeal as being a final judgment, appellant contends (p. 17):

> "It follows necessarily that the cause of action for breach of statute, so adjudicated and 'merged and gone forever,' was not pending in any sense after the case was remanded on the other cause of action and when the 1941 law was passed. * * *
>
> "*It is readily apparent that both courts considered and decided the question of revival as though the prior judgment in this very case was entitled to no legal effect whatsoever.* * * *
>
> "Disregard of the prior and final adjudication of the statutory cause of action lead inevitably to error. Certainly that judgment in appellant's favor constituted personal property and a valuable right, which thereby became vested in appellant." (Italics supplied.)

Without prejudice to the result we could, though we do not, admit that the decision here under appeal constituted a reversal of the decision rendered on the first appeal, and then quote what this Court said in *Tidal Oil Co. vs. Flanagan*, 263 U. S. 444, 450:

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party, does not take away his property without due process of law."

This Court will not review a question whether a decision of a state Court, in effect, and erroneously, overruled prior

decisions of that Court.

Central Land Co. vs. Laidley, 159 U. S. 103, 112.

The mere fact that the highest Court of a state has reversed its prior construction of a statute dealing with modes of local procedure does not empower this Court to review the correctness of the construction, nor does it necessarily follow that this Court has jurisdiction on a theory of deprivation of fundamental rights.

A. Backus, Jr., & Sons vs. Ft. Street Union Depot Co., 169 U. S. 557, 570.

A determination by a state's highest court as to the finality of a determination under local law is binding on this Court.

Wheeling & Belmont Bridge Co. vs. Wheeling Bridge Co., 138 U. S. 287.

"The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here."

Chouteau vs. Gibson, 111 U. S. 200, 201.

The scope and effect of a state judgment is peculiarly a question of state law.

Kenney vs. Craven, 215 U. S. 125, 130.

The Minnesota Supreme Court has decided:

"That, to be pleadable in bar, a former adjudication must be a final determination *of the merits* of the action, is elementary."

Craver vs. Christian, 34 Minn. 397, 398.

A judgment of dismissal because of limitations, without an adjudication of the merits does not merge the cause of action.

2 *Beale, Conflict of Laws*, 1125, Sec. 450.11, citing:
Brand vs. Brand, 116 Ky. 785.*

*A New York court had directed judgment for defendant because the action was barred by limitations, under New York law. Respecting the New York rule that limitations go to the remedy only, the Kentucky court held that a new action was maintainable in Kentucky on the same cause of action, which was not barred by Kentucky law.

B.

Appellant's Point 1 Is Unsound on Its Merits.

Should the Court be disposed to consider appellant's Point 1 on its merits, we believe that an analysis of appellant's argument will show that this question is presented:

Was the decision of reversal upon the first appeal—accompanied by a judgment for appeal costs and a remittitur for "further proceedings" in respect to "issues other than the tolling of the statute of limitations"—the equivalent of a final judgment on the merits on a separate and distinct cause of action based "upon a liability created by statute," so as to give appellant a vested right in such judgment?

In arguing the affirmative, appellant proceeds upon the following premises, the falsity of any one of which will invalidate its entire Point 1:

1. That plaintiff sued on two separate causes of action.
2. That the liability of a seller of corporate stock illegally sold for lack of registration, is a "liability created by statute," and not an "obligation, express or implied, as to which no other limitation is expressly prescribed," within the meaning of the Minnesota general statute of limitation (*Mason's Minn. Stats., 1927*, Sec. 9191 (1) (2); *Minn. Stats., 1941*, Sec. 541.05 (1) (2).
3. That the decision rendered by the Minnesota Supreme Court on the first appeal was a final judgment on the merits and *res judicata*.
4. That "The cause of action for breach of the statute was not pending in any sense after the case was remanded on the other cause of action and when the 1944 law was passed."

Our argument that follows is based upon propositions argued in the following order: (1) No final judgment was rendered on the first appeal; the Supreme Court merely made an interlocutory ruling that limitations had not been tolled

by appellant's absence from the state, and remanded the cause to the trial court with power to determine any issue other than whether limitations had been tolled by appellant's absence from the state. (2) The cause was still pending when the controlling statute, the 1941 law, became effective; therefore, the Supreme Court on the second appeal properly ignored its interlocutory ruling made on the previous appeal. (3) The case involves a single common-law cause of action based upon a single tortious sale of stock to the plaintiff, that was doubly wrongful because at one and the same time appellant violated the Blue Sky Law and committed common-law fraud.

(1) No Final Judgment Was Rendered by the Minnesota Supreme Court on the First Appeal; There Was Merely an Interlocutory Ruling That Limitations Had Not Been Tolled by Appellant's Absence from the State.

Even if there had been a final judgment on the first appeal that the action was in whole or in part barred, we should still rely upon doctrine discussed in our Point II, *post*, as sustaining the validity of the 1941 law. But, since appellant's brief relies principally upon the character of the determination on the first appeal we are constrained to discuss the point in detail.

The first appeal submitted two questions to the Minnesota Supreme Court: (1) Did the proof support the trial court's finding that appellant violated the Blue Sky Law by selling unregistered securities to plaintiff? (2) Were limitations, under existing statutes, tolled by defendant's absence from the state? The Supreme Court answered the second question no, and therefore found it unnecessary to answer the first. The case was sent back to the trial court with wide-open authority to pass upon any issue in the case "other than

that of the tolling of the statute of limitations" (R. 362-363, f. 1766).

The full scope of the Supreme Court's bare majority decision on the first appeal appears in this brief opinion:

> "Our decision in a companion case, *Pomeroy vs. National City Co.*, 209 Minn. 155, 296 N. W. 513, is decisive of *the only question presented by this appeal* and requires reversal of the judgment under review.
>
> "This record indicates the presence of issues *other than that of the tolling of the statute of limitations.* If in respect to such issues there are further proceedings below, this decision is without prejudice to them or to the result" (R. 362, 363, f. 1766). (Italics supplied.)

Referring to the opinion in the *Pomeroy Case*, mentioned by the state Court as governing this case, it appears that the issue decided was thus narrowly stated by that Court:

> "If, within the meaning of the tolling statute, defendant departed therefrom in 1931 and has since resided out of the state, the statute of limitations was tolled and the demurrer [to defendant's plea of limitations] properly sustained. *This presents the one question for decision*" (R. 354, f. 1757). (Italics supplied.)

In no sense could the determination by the Minnesota Supreme Court on the first appeal be regarded as a *final judgment*, because the Court did not purport to put an end to the litigation. Before there could be any final judgment in appellant's favor, it was essential that it be rendered by the trial court after the remand. An analogy is suggested by what this Court said in *McCombs vs. Knox County Comrs.*, 91 U. S. 1, where litigation ended in a court of common pleas after a prior appeal to a state Supreme Court:

> "The supreme court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the common pleas to permit the parties to make a new case by amendment. * * * *The*

final judgment is therefore the judgment of the court of common pleas, and not of the supreme court. It may have been the necessary result of the decision by the supreme court of the questions presented for its determination; but it is none the less, on that account, the act of the common pleas." (Italics supplied.)

The Minnesota Court has repeatedly recognized that a decision on a former appeal is law of the case only so far as applicable to proceedings had in the lower court after remand.

State vs. Red River Lbr. Co., 157 Minn. 7, 14.

County of Redwood vs. City of Minneapolis, 131 Minn. 41, 42.

"There is nothing in * * * the 14th Amendment which prevents a state from permitting an appellate court to alter or correct its *interlocutory decision* upon a first appeal when the same case, with the same parties, comes back before it again; and *whether this is permitted is a question of local law, upon which the decision of the highest court of the state is controlling here.*" (Italics supplied.)

Moss vs. Ramey, 239 U. S. 538, 546-547.

An earlier *decree* may be changed by direct order or indirectly, by construction, while a case remains within the jurisdiction of the state court.

King vs. West Virginia, 216 U. S. 92, 100-101.

A judgment of reversal is not "final" when based upon a ground which may or may not be finally determinative of the case, the case being remanded for proceedings consistent with the point decided.

Haseltine vs. Central National Bank, 183 U. S. 130, 131.

City of Aurora vs. West, 74 U. S. (7 Wall.) 82.

When the case was remanded to the trial court on the first appeal it stood the same as if it had never been tried, excepting as to the sole issue whether appellant's absence from the

state tolled limitations.

Hickey vs. Johnson (C. C. A. 8), 9 F. (2d) 498, 505.

The situation at bar is covered by other decisions of the Minnesota Supreme Court, and by decisions of this Court, cited below:

Sands vs. American Rf. Express Co., 159 Minn. 25, 26.

"Our former decision * * * is invoked by appellants as *res judicata*. It does not have that effect because no issue becomes *res judicata* until made so by final judgment."

In re Estate of Hallbom, 189 Minn. 383, 386.

"There is no doubt but that this court has power to overrule its prior decisions, and may do so in a proper case, even to the extent of overruling the decision made on a prior appeal in the same case."

Kozisek vs. Brigham, 183 Minn. 457, 460.

"In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power*." (Italics supplied.)

Messenger vs. Anderson, 225 U. S. 436, 444.

Southern Ry. Co. vs. Cliff, 260 U. S. 316, 319.

(2) Because the Case Remained Pending After the First Appeal, and Because It Was the Power, If Not the Duty, of the Lower Courts to Render Final Judgment in the Light of an Intervening and Controlling Statute, Appellant Has Not Been Deprived of Any Right or Property.

We respectfully submit that this appeal should be disposed of upon the theory that all that the Minnesota Supreme Court decided on the first appeal was that limitations had not been tolled by appellant's absence from the state. That Court never explicitly determined that the action was barred,

much less rendered any *final judgment* to that effect. The most that appellant can claim is any inference that must be drawn from the Court's statement that the 1941 law applied to "cases already *pending*, * * * even though it was passed subsequent to a determination by this Court that the cause was barred" (R. 408-409, par. 5). Appellant does seize upon the Court's obviously inadvertent statement that there had been a determination that the cause was barred, as distinguished from the actual ruling that limitations had not been tolled by appellant's absence from the state. But appellant attempts to reject the Court's inseparably connected recognition that this action was "pending" when the 1941 law was passed—after the case had been remanded on the first appeal. Appellant seems to realize that it could have no vested right if the case were still pending.

Conceding, *arguendo;* that, without rendering or ordering final judgment, the State Supreme Court did determine on the first appeal that the cause was barred, its conclusion that the case remained pending should not be disturbed, first, because that Court has final say as to when an action under the state law is pending, and, second, because the conclusion, on its merits, is in harmony with decisions of this Court.

The Minnesota Court has established the rule that an action "is deemed pending until its *final* determination," and will be so regarded when there is nothing to show that it has been "determined or dismissed."

Seeger vs. Young, 127 Minn. 446, 448-449.

That rule accords with this Court's views, as shown by:

Montoya vs. Gonzales, 232 U. S. 375, 376.

Clark vs. Roller, 199 U. S. 541, 546.

Great Western Tel. Co. vs. Burnham, 162 U. S. 339, 342.

In the case at bar the Minnesota Supreme Court distinctly

followed and applied the doctrine of *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281, that "where a statute which is clearly intended to be retroactive and to apply to pending litigation is enacted after judgment and pending appeal, the appellate court may dispose of the case in accordance with the law as changed by the statute." The New York decision in turn followed these cases decided by this Court:

United States vs. Schooner Peggy, 1 Cranch. 103, reversing a decree of condemnation in admiralty in the light of a treaty, although the decree was correct when made.

Dinsmore vs. Southern Express Co., 183 U. S. 115, giving effect to a statute that took effect after the case was submitted to this Court.

Union Pac. R. R. Co. vs. Snow, 231 U. S. 204, 211, recognizing that "a judgment, though not erroneous when rendered, may become so by subsequent law."

See, also, *Utter vs. Franklin*, 172 U. S. 416, where this Court said of a prior judgment declaring county bonds void, which was nullified by a ratifying statute:

> "The judgment in that case was *res judicata* only of the issues as they then appeared, and of the legislation then existing."

That the 1941 law introduced into the case at bar a *changed condition*, while the cause was still pending, which left it open to the trial court, and, on the second appeal, the state Supreme Court, to consider and apply that law, is demonstrated by the reasoning of this Court in *Gulf, C. & S. F. Ry. Co. vs. Dennis*, 224 U. S. 503. There it was recognized that an "appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

Obviously, the highest Court of a state may assume the same power or duty with reference to local practice that this Court recognized it possessed as to federal practice, when this Court said:

> "* * * It does not follow that where, pending the writ, a statute of the state or a decision of its highest judicial tribunal intervenes and put an end to the right which the judgment sustains, we should ignore the *changed situation*, and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our *duty* to recognize the changed situation, and either to apply the intervening law or decision, or set aside the judgment and remand the case so that the state court may do so." (Italics supplied.)

Where a statute was amended while a cause was pending before this Court, effect was given to the amendment, although it had not been considered in the court below.

Carpenter vs. Wabash Ry. Co., 309 U. S. 23, 26-27, 29.

The Court said:

> "For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and *in the light of the law as it then stood*. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. * * *
>
> "* * *: There is *no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending.*" (Italics supplied.)

In *Metzger Motor Car Co. vs. Parrott*, 233 U. S. 36, this Court decided that a litigant did not have a vested right in a decision by the highest Court of a state that a certain local statute was valid, so as to preclude application against him of a later decision of the same Court holding the statute to be unconstitutional.

Appellant's reliance (pp. 19-20) upon intimations in this Court's opinion in *Pope vs. United States*, 89 L. Ed. 5 (Adv.), is unjustified. There it was decided that an unreversed judgment conclusively established that a claimant was not entitled to recover. But the Court recognized that until the judgment became final it was subject to abrogation, saying (pp. 9-10):

> "Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment *which was final.* * * * This Court denied certiorari, and the judgment, *which remains undisturbed by any subsequent legislative or* judicial *action,* conclusively established that petitioner was not entitled to recover on his claim."

Appellant inappropriately cites *United States vs. Klein*, 13 Wall. 128, and other decisions of this Court on the point that a vested right in a final judgment cannot be divested (pp. 17-18). Those cases are distinguishable on the ground stated by this Court in *Pope vs. United States, supra*, where the Court refers to the opinion in the *Klein Case* as pointing out that Congress could not authorize a court "to render final judgment in those cases and controversies which, pursuant to existing statutes had been *previously litigated.*" (Italics supplied.)

Even where the Minnesota Supreme Court had successively affirmed two judgments denying the same relief, one of the judgments having been rendered ten years before, the Court held that, because of an intervening statute and other changed conditions, there was no bar to a third action for the same relief.

Guilford vs. Western Union Tel. Co., 59 Minn. 332.

In another case, although the Minnesota Supreme Court had decided that the State of Wisconsin could not recover on a note given by defendants to an agent of the plaintiff

State, because taken by him without authority and because its taking had not been ratified, if later ruled that there was no bar to subsequent recovery in a second action on the same note after subsequent enactment of a law ratifying the agent's act.

State of Wisconsin vs. Torinus, 28 Minn. 175.

In the light of the proceedings had in this case, on both appeals below, the case, in principle, falls within this Court's approval of the Pennsylvania Supreme Court's ruling that a prior judgment in a federal court merely adjudicated "plaintiff's right to maintain its action as an unregistered foreign corporation," and that that impediment had been removed by a subsequent statute.

West Side Belt R. Co. vs. Pittsburgh Const. Co., 219 U. S. 92, 98 99, 101.

In *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271 (referred to in our argument under Point II, *post*, because of its strikingly close resemblance, in principle, to the case at bar), the New York Court of Appeals applied a statute similar to the 1941 law as reviving a cause of action, although the trial court and the Appellate Division had declared the action barred under the then existing law.

(3) Plaintiff Did Not Sue Upon Two Separate Causes of Action, One Created by Statute and the Other Arising Under the Common Law, But Upon a Single Common-law Cause of Action in Tort.

Should the Court sustain our above discussed contention that no final judgment was rendered on the first appeal to the Minnesota Supreme Court and that appellant was not deprived of any vested right as to the Court's ruling on that appeal, appellant's Point I must fail, regardless of whether

this action was brought upon one or two causes of action.

However, since appellant's Point 2 (p. 20) largely depends upon the character of the action, special attention should be given to appellant's reiterated statement in its brief, under both Points 1 and 2, that we have sued upon a "statutory cause of action" or "upon a liability created by statute." It is our view that the question whether we have sued upon such a cause of action or upon such liability is not reviewable because the state Supreme Court made a binding characterization of the action as being in tort and rejected appellant's contention that we sued upon a cause of action created by statute.

The decision of the state Supreme Court is to be read in the light of the following legal conclusion reached by the trial court in finding for plaintiff on the merits, both as to fraud and statutory violation by appellant:

> "In so far as the provisions of" the 1941 law "are applicable to plaintiff's *cause of action*, or any of the *separate grounds of relief* asserted by plaintiff, the time for assertion thereof or commencement of the action thereon was extended by said statute to July 1, 1942, and plaintiff's action was duly commenced within the time limited by the statutes of * * * Minnesota" (R. 303-314, ff. 1157-1158). (Italics supplied.)

The opinion of the Minnesota Supreme Court here under review also impliedly treated the case as presenting but a single cause of action based upon dual grounds:

> "The action was brought in tort to recover as damages the purchase price of unregistered securities sold * * * in alleged violation of the securities law, * * * which required their registration. It also sought recovery on the ground of deceit based on misrepresentation, but, in view of our disposition of the case, we need not consider that phase of the case.
>
> "* * * The action is in tort" (R. 191-195, par. 2).
>
> "*The case at bar is to be distinguished from a third*

class of cases where a cause of action is created by statute," etc. (R. 402-403, 408). (Italics supplied.)

If, as we contend, the state Supreme Court's characterization of the cause of action sued upon is binding, because relating to a matter of local law and practice, appellant has tied its own hands by a concession:

"* * * The state court failed to note or give necessary weight to the" factor "that the action was one predicated entirely upon a breach of statutory duty. * * * *Instead, the opinion * * * shows that the action was considered as though it were one to recover upon a common-law liability*," etc. (p. 21).

"The statutory basis of the action is controlling. Calling it an action of damages for tort arising from violation of the statute *(as the court did on the second appeal)* cannot alter its essential character" (pp. 23-24). (Italics supplied.)

But, if appellant could escape from the consequences of its admission that the highest Court of the state characterized the action as being brought to recover upon a common-law liability, it would still face the fact that the Record fails to show that appellant ever seasonably submitted to the Minnesota Supreme Court a contention that two separate causes of action were presented and that one of them was statutory. The state Supreme Court's reference to cases distinguishable as based upon a cause of action "created by statute" does not appear to have been prompted by any such contention by appellant, but was made in classifying the different situations in which a statutory bar by limitations can be lifted retroactively.

(a)

Appellant's Contention Should Be Dismissed as Not Presenting a Federal Question.

Osborne vs. Gray, 241 U. S. 16, 20, holding that whether plaintiff in a personal injury action sued under the common law was purely a state question.

Chicago, Rock Island & P. Ry. Co. vs. Whitaker, 239 U. S. 421, 424-425, holding that a state Court's ruling as to whether a petition stated a cause of action against a resident joined as defendant with a non-resident was not reviewable.

First National Bank vs. Anderson, 269 U. S. 341, 346, refusing to review a state Court's determination that a case was cognizable in equity, and showing that this Court's right to review the effect of pleadings as setting up a right of action or defense is limited to cases where Federal law is involved.

Milk Wagon Drivers' Union vs. Meadowmoor Dairies, 312 U. S. 287, 296, reaffirming the rule that there is no "supervisory power over state practice, * * * not used to evade constitutional guaranties."

Even if, from the viewpoint of this Court, the state Supreme Court erred in construing local laws that would not uphold appellant's contention of deprivation of due process.

Neblett vs. Carpenter, 305 U. S. 297, 302.

(b)

Appellant Is Estopped to Assert That Plaintiff Sued on More Than One Cause of Action.

This phase of the case is disposable on the independent ground that appellant estopped itself in both Courts below to assert the existence of more than one cause of action. In fact, as shown in our Statement of the Case under the subheading, "Character of Cause of Action," *supra*, appellant virtually stipulated that there was but one cause of action involved.

The answer treated the complaint as pleading a single cause of action covering a single transaction (R. 16, 18, par. XI (4) (5)).

Appellant's acquiescence in plaintiff's theory that the complaint stated only a single cause of action is further shown by the colloquy at the opening of the trial (R. 24-25, 29, 33-34).

The last paragraph of the opinion in *Wilson vs. Gregory*, 189 S. C. 62, supports our position that the recitals of the appellant's answer and the colloquy at the opening of the trial above referred to constituted a binding concession by counsel for appellant that the action presented but a single cause of action.

(c)

This Is Not an Action Upon a "Liability Created by Statute."

Should this Court be disposed to review on its merits the state Supreme Court's determination that this is a common-law action, we respectfully submit that that determination is sound under the facts of this case, under well-established practice in Minnesota, and under principles recognized by this Court.

We cannot understand why appellant does not concede binding effect to the state Supreme Court's declaration (R. 404-405, par. 2) that "the action is in tort." We should not be disposed to go back of that declaration except for several inaccurate statements in appellant's brief concerning the nature of previous decisions of the Minnesota Court, and concerning what was held in similar cases passed upon by the Circuit Court of Appeals, Eighth Circuit.

Supporting its conclusion that the action at bar "is in tort," the Minnesota Supreme Court cited a previous decision to which appellant makes no reference—*Dyess vs. Min-*

nesota Petroleum Co., 189 Minn. 608, 611. In that case, an action of the same general kind as our case, the Court specifically declared that the action was brought "on the ground of tort."

Appellant does not claim that the Blue Sky Law specifies that a buyer of illegally sold stock can sue the seller, or that when this action was brought any reference was made in that law to such actions. Even now there is nothing that explicitly confers any substantive rights upon buyers of stock. The most that has been done is merely to prescribe, in the 1941 amendment, the time for bringing actions of this kind.

The Minnesota Supreme Court's conclusion that this is not an action "upon a liability created by statute other than those arising upon a penalty or forfeiture," within *Mason's Minn. Stats., 1927*, Sec. 9191 (2), is in line with the fact that Blue Sky Laws had not been thought of when that statute, substantially in its present form was enacted. Without tracing the statute back to its precise source, it is enough that *Statutes of Minnesota, 1866*, Ch. 66, Sec. 6, contain a clause of identical wording, excepting that "arising" is omitted. There was no Blue Sky Law in Minnesota until 1917 (Laws of Minnesota, 1917, Ch. 429).

True, the opinion of the Minnesota Supreme Court on the first appeal did *casually* say that the action must be considered as one based "upon a liability created by statute," and was to be deemed barred under the six-year statute unless saved by the tolling provision (R. 354, f. 1757). But no issue was then before the Court as to the nature of the action. The sole determination made, that appellant's absence from the state did not toll limitations, rendered it unimportant to classify the action among the subdivisions of the six-year statute because the result would be the same were the case classified as a tort action or as an action on statutory liability. Nor was the observation that the action was barred

unless saved by the tolling statute, through appellant's absence from the state, essential to the sole determination that the statute was not tolled by appellant's absence. Therefore, appellant relies upon *dictum* in the first opinion as opposed to the definite characterization of the action made by the Supreme Court on the second appeal, where classification was first called for by appellant.

Appellant inaccurately asserts (p. 15) that the Court in *Chase Securities Corp. vs. Vogel* (C. C. A. 8), 110 F. (2d) 607, a case admittedly of this type, "treated the cause of action for violation of statute as a distinct cause of action." On the contrary, the Circuit Court of Appeals referred to the statutory violation and the fraud claim as "*grounds* upon which plaintiff claimed the right to recover" (p. 608).

Appellant does not draw attention to the statement in a companion case decided by the Circuit Court of Appeals at the same time as the *Vogel Case, supra*:

> "The question presented * * * is whether the appellee's *cause of action* is barred by the statute of limitations. * * * The right of recovery was based on the *grounds* (1) that the sales were illegal and void because the stocks were not registered, * * * and (2) that there was fraud, both actual and implied, in the sales" *(City Co. of New York vs. Stern*, 110 F. (2d) 601, 602).

Thereby the Circuit Court of Appeals recognized that as to each single sale of stock there was but a single cause of action, although based upon statutory violation and fraud.

In another case of the same kind—*Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, 684, the decision in which became final without any appeal, Judge Bell specifically considered the nature of the cause of action, saying:

> "Therefore, the first question is on the bar of the statute and that question involves the nature of the cause of action."

After citing and reviewing decisions of the Minnesota Supreme Court, Judge Bell concluded:

> "The Minnesota decisions above cited clearly indicate that the action is not on a contract, express or implied, or on a liability created by statute. * * *
>
> "The action is in tort according to the Supreme Court of Minnesota."

Should this Court be disposed to look beyond the opinion of the Minnesota Supreme Court now under review for light as to the nature of the cause of action sued upon in the case at bar, we are sure that the Court will not overlook the weight to be attached to the views of Judges Joyce and Bell because of their peculiar familiarity with the law and practice of the state in which they reside.

Appellant makes the amazingly inaccurate statement (p. 23) that *Vercellini vs. U. S. I. Realty Co.*, 158 Minn. 72, and other cited Minnesota cases previously established a rule in Minnesota that actions of this kind involve "a statutory cause of action, which cannot exist except for such statute." That statement is particularly inexcusable in view of the Minnesota Supreme Court's citation in the opinion here under review of *Drees vs. Minnesota Petroleum Co.*, 189 Minn. 608, 611, as showing that these actions are in tort. By referring to District Judge Bell's opinion in *Shepard vs. City Co. of New York* (D. C., Minn.), 24 F. Supp. 682, 684, a dependable summary of what was held in the cases cited by appellant will show that those cases do not support appellant's reliance upon them, and that, on the contrary, they show, as declared by Judge Bell, that

> "the action is not * * * on a liability created by statute" (24 F. Supp. 684, 2d col.).

We go back of the *Drees Case, supra*, only to refute appellant's contention that the Minnesota Supreme Court formerly held that actions of this kind were based upon statutory

liability. But it would not help appellant if the decision in this case and in the *Drees Case* were contrary to previous holdings by the Minnesota Court. Such departure would not have deprived appellant of any constitutional right. (*Patterson vs. Colorado*, 205 U. S. 454, 461.)

The Minnesota Supreme Court has long and consistently adhered to—

> "the rule that where the statute for the protection and benefit of individuals, prohibits a person from doing an act, or imposes upon him a duty, if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience or neglect."
>
> *Baxter vs. Coughlin*, 70 Minn. 1, 4.

The Court applied the rule to another and later action by bank depositors to recover from directors deposits received during insolvency of the bank, in violation of a statute.

Olesen vs. Retzlaff, 184 Minn. 624.

In the last cited case the Court said:

> "*The statute does not assume to impose civil liability upon the directors nor to give the depositors a cause of action against them. The liability arises from the application of the general principle that when a statute is enacted for the protection of a class one of the class who suffers damage from its violation may recover of the violator*" (p. 627). (Italics supplied.)

Reviewing the point after reargument, the Court added:

> "A cause of action has come about by the construction of courts because of the violation of a criminal statute. There was no such action at common law; that is, there was no such liability. If there had been a liability there would have been a common law remedy. If there is liability now because of a violation of the statute *there is a common law remedy without specific creation*" (p. 632). (Italics supplied.)

In *Osborne vs. McMasters*, 40 Minn. 103, 105, where common-law and statutory duties affecting liability for personal injuries were mentioned, the Court said:

> "The only difference is that in the one case the measure of legal duty is to be determined upon common law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence. * * * The action in the latter case is not a statutory one," etc.

The cases are in line with *Metropolitan R. Co. vs. District of Columbia*, 132 U. S. 1:

> "The fact that the duty which defendant failed to perform was a statutory one does not make the action one upon the statute."

(d)

This Action Presents a Single Cause of Action Based Upon Several Grounds.

Appellant does not seem to argue that two causes of action are presented, unless it be found that we sued on a statutory liability. It is not contended that the joinder of fraud as one ground of recovery and a *common-law* ground based on violation of the statute, would create more than one cause of action. Such a contention clearly would be fallacious under the authorities above-cited.

In passing, it is to be observed that a conclusion that but one cause of action is involved is in line with a doctrine well-established both in this Court and in Minnesota. Obvious analogies are presented in the cases cited below:

> "That cause of action is the alleged violation by defendant of its duty to exercise proper care to avoid injury to plaintiff while he was upon its train. * * * If defendant violated this duty such violation gave rise to only one cause of action and one remedy, whether the duty was imposed by the Federal statute or by the state

law. *Payne vs. New York, S. & W. R. Co.*, 201 N. Y. 136."

Tudey vs. Oregon Short Line R. Co., 131 Minn. 317, 318.

In *New York Central & H. R. R. Co. vs. Kinney*, 260 U. S. 340, 346, this Court ruled that, as affected by running of limitations, a new cause of action for personal injury was not pleaded by an amendment that brought the case within Federal law by averring that the parties were engaged in interstate commerce. This Court applied what it had said in *Seaboard Air Line R. Co. vs. Kouns*, 239 U. S. 352, 354:

"The facts constituting the tort were the same whichever law gave them that effect.

"The mere multiplication of grounds alleged as causing the same injury does not result in multiplying the causes of action."

Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 321.

Analogies are furnished by cases where copyright and trade-mark rights are blended with common-law rights:

"The bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action."

Buck vs. Oursler, 289 U. S. 238, 246.

"The cause of action is the interference with the exclusive right to use the mark 'Nu-Enamel.' If it is a properly registered trade-mark, *a ground* to support *the cause of action* is violation of the Trade-Mark Act. If it is not a properly registered trade-mark, the ground is unfair competition at common law. The facts supporting a suit for infringement and one for unfair competition are substantially the same. They constitute and make plain the wrong complained of, the violation of the right to exclusive use." (Italics supplied.)

Armstrong Paint & V. Works vs. Nu-Enamel Corp., 305 U. S. 315, 324-325.

II.

Appellant's Contention (Point 2), That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Deprives Appellant of Property Without Due Process of Law Is Not Reviewable, Because, in Part, it Rests Upon Grounds Not Shown to Have Been Seasonably Presented to, or Ever Passed Upon by, That Court; and Because, in Part, the Contention Rests Upon an Unpermissible Attempt to Contradict That Court Upon Points of Local Law and Procedure. The Court's Decision Is Sound on the Merits.

(See Appellant's Brief, p. 20.)

Appellant's principal contention on this phase of the case is limited by the portion of its Point 2 which we italicize:

> "The 1941 law, as here construed and applied deprives appellant of its *property* without due process of law *because it revives a statutory cause of action which had become barred by the then applicable statute of limitations*" (p. 20). (Italics supplied.)

Elaborating, appellant states:

> "The broader question of legislative power to revive a statutory cause of action, barred under a statute of limitations expressly covering a liability created by statute, has never been squarely determined by this Court. The state court decision, however, is contrary to * * * this Court's applicable cases" (pp. 20-21).
>
> "The state court erred in these respects"—in deciding that this is not a suit on "a liability created by statute" (pp. 21-23).

Upon an obvious assumption that this Court will override the Minnesota Supreme Court's determination that, under local law and practice, this suit was not brought on "a liability created by statute," but is a common-law tort action, appellant proceeds to argue the "Inapplicability of *Campbell vs. Holt*," 115 U. S. 620 (pp. 24-27). But a longer

argument (pp. 27-35) is devoted to "The Error of *Campbell vs. Holt*, Were It Applicable."

A.

Appellant's Point 2 Is Not Reviewable.

(1) Not Seasonably Presented.

If any Federal question is raised by this appeal, the Record will be searched in vain for anything that shows the nature of the question presented, or the grounds preserved below for a review, excepting this short statement in the state Supreme Court's opinion:

> "It is the contention of defendant that the lifting of the bar of the statute in this case is a violation of the due process clauses of the state and federal constitutions" (R. 406, par. 4).

The opinion does not mention any specific contention made by appellant. The state Supreme Court's discussion of the point turned mainly upon "The leading case *cited by plaintiff in support of the legislature's constitutional power to lift the bar* * * * *Campbell vs. Holt*, 115 U. S. 620" (R. 406, par. 4). (Italics supplied.)

As to the existence or not of ground for reviewing appellant's present principal contention that our suit is based upon a "liability created by statute," as to which a statutory bar could not be lifted by retroactive statute, the opinion does not show that appellant raised the point before the state Supreme Court. The opinion merely says on that phase: "The case at bar is to be distinguished from a third class of cases where a cause of action is created by statute * * * and the same statute prescribes a period of limitation within which the cause must be brought" (R. 408). The Record does not show that the Court's holding on that point was

responsive to any contention made by appellant.

So, all that the Record shows, as to preservation of ground for review of appellant's Point 2, is the bare statement in the Minnesota Supreme Court's opinion, already quoted.

Excepting as the opinion itself shows just what subsidiary questions were considered and decided, in upholding the validity of the 1941 law, the case falls within the general rule that a bare averment of a federal question does not give this Court jurisdiction.

> An averment that a statute violates a designated clause of the Federal Constitution "without stating wherein there was such a violation" is "too indefinite to present a constitutional question."
>
> *Lorell vs. City of Griffin*, 303 U. S. 444, 449.
>
> *City of New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79.
>
> *Clarke vs. McDade*, 165 U. S. 168, 172.

Appellant would not be entitled to a review of grounds not shown to have been passed upon by the state Supreme Court even if they were "more or less similar" to grounds actually asserted.

Osborne vs. Clark, 204 U. S. 565, 568-569.

We have not overlooked the line of decisions of this Court to the effect that the opinion of a state Supreme Court may be examined to determine whether or not a federal question is presented. But we find nothing to show that, in a case like this, the Court will consider contentions of an appellant not shown to have been seasonably presented to, or passed upon by, the state Supreme Court.

(2) Contentions Made by Appellant Contradict Binding Conclusions of the State Supreme Court on Matters of Local Law.

We respectfully submit that, so far as appellant's Points 1 and 2 rest upon subsidiary contentions that this suit is based upon a cause of action created by a statute which makes limitations a part of the right itself, those contentions should be summarily dismissed. As hereinbefore shown under our Point I, *supra*, the Minnesota Supreme Court has bindingly decided that the cause of action is not of that nature.

In a very recent case—*Kraushaar vs. Leschin* (D. C., E. D., Pa.), 4 F. R. D. 143, 144—District Judge Kirkpatrick regarded himself as bound by a state Court decision that a statute was a general statute of limitations and that the time limitation was not a "condition of the cause itself."

That decision respects a long and well-established rule of this Court. *Tioga R. R. Co. vs. Blossburg & Corning R. R. Co.*, 20 Wall. 137, decided that a state court's construction of a statute of limitations, as applied to a foreign corporation, was binding upon this Court. In a concurring opinion, Mr. Justice Hunt aptly observed:

> "Statutes of Limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper."

A state Court decision as to the time within which an action may be brought under the local laws is not reviewable by this Court.

Seneca Nation vs. Christy, 162 U. S. 283.

The Minnesota Supreme Court's opinion does not show that appellant contended that it had been deprived of property

or a vested right, excepting as that may be inferred from a mere quotation from one of its earlier opinions, to the effect that "No man has a vested right to a mere remedy," etc. (R. 407). But that does not suggest that appellant asked the Court to rule that plaintiff's cause of action had been barred by former judgment or by mere lapse of time. (As hereinafter shown, there has never been any adjudication that this action ever was barred, and the nature of the single cause of action sued on is such that such an adjudication could not be expected.)

Search of the Record and appellant's Jurisdictional Statement discloses nothing to indicate the nature and scope of contentions presented below beyond what is shown by the following summary:

The only assignments of error presented to the Minnesota Supreme Court concerning the 1941 law were directed against the trial court's finding that the law applied and refusal to declare that the law did not apply (R. 385, 399, Assignments 31, 42 (a)). Of course, they raised no constitutional question.

The Jurisdictional Statement filed in this Court by the appellant only serves to emphasize the absence of preserved ground for review of appellant's Point 2. We summarize its pertinent passages:

Appendix F, p. 44: Merely shows that appellant asked the trial court to decide that the 1941 law *did not apply to the case.*

Appendix G, p. 45: Merely asked the trial court to decide that the action was barred and was not revived by the 1941 law. (The assertion made in this connection (p. 46) to the effect that if the *Blue Sky Law* applied it was unconstitutional has no bearing on this appeal; it had to do with substantive provisions of that law.)

Appendix G, p. 47: Does show that the broad question whether 1941 law was constitutional, was raised in the trial court by motion for new trial, but no theory as to how it deprived appellant of property without due

process was urged. Appendix II (pp. 48-49) which purports to list errors assigned in the Minnesota Supreme Court on the second appeal, pertaining to the 1941 law, complains only of the trial court's finding that that law was *applicable*.

The briefs filed in this case in the Minnesota Supreme Court are no part of the Record and we do not intimate that they contain anything helpful on this phase of the case to either party. However, foreseeing that our argument above may prompt appellant to re-examine those briefs and possibly to make some use of them on this appeal, we respectfully draw attention to:

Zadig vs. Baldwin, 166 U. S. 485, holding that a Federal question could not be brought into the case by printing an extract from a brief in the state Supreme Court, or by assertion in oral argument in this Court that the question was presented in the state Court.

B.

Appellant's Point 2 Considered on Its Merits.

Even if it were open to this Court to determine the nature of this action under Minnesota law and procedure these decisive facts still would remain: (1) The Minnesota Blue Sky Law does not, and never did, purport to create a right of action in favor of a buyer of securities sold to him in violation of the law. The basis of the action may be violation of the statute, but the right to sue is given by the common law. (2) When this action was brought it was governed by Minnesota's general statutes of limitation applicable to actions generally, statutes which antedated the Blue Sky Law by more than fifty years. There is no contention on appellant's part that the Minnesota legislature ever enacted any statute specifically applicable to an action of this kind until the 1941 law was passed.

(1)

Appellant Erroneously Assumes That This Action Was Barred When Brought.

Hereinafter we meet appellant's argument under its Points 2 and 3 on an assumption, *arguendo*, that this action was barred when brought by the mere fact that more than six years elapsed after plaintiff's purchase of securities from appellant. As shown by the Minnesota Supreme Court's opinion that Court impliedly gave appellant the benefit of that hypothesis. We shall presently refer in detail to considerations that support the Minnesota Court's conclusion that appellant was not deprived of constitutional right.

However, we submit that the Record conclusively establishes a point which in itself is enough to call for dismissal of the appeal. That point is that appellant fails to substantiate its contention that this action was barred before the 1941 law was enacted, a contention upon which appellant's entire brief depends.

Appellant does not controvert the proposition well-established by decisions of this Court:

> The legislature, without violation of the guaranties of due process of law, may extend the period of limitations. *Home Bldg. & Loan Assn. vs. Blaisdell*, 290 U. S. 398.

Starting from the base established under the last subdivision of our argument under Point 1, that this action is on a *single cause of action* grounded upon blended violation of the Blue Sky Law and common-law fraud, we first examine the trial court's unreversed findings. They explicitly found that appellant impliedly represented that the securities had been registered, and "*fraudulently and wilfully*" concealed the facts that the securities had not been registered and that their market price had been manipulated by an illegal pool.

A related finding found that the securities were sold in violation of the Blue Sky Law (R. 303-305, Findings XV, XVII, XIX). The trial court further found that plaintiff had no notice or knowledge of the last-stated facts (R. 304-305, Finding XVIII) until about October 1, 1937 (R. 313, Finding XXXII). Finally, the trial court found that in so far as the 1941 law applies "to plaintiff's *cause* of action or any of the separate grounds for relief asserted by plaintiff," this action "was duly commenced within the time limited by the statutes of * * * Minnesota" (R. 313-314, Finding XXXII).

The Supreme Court, on the second appeal, decided that we were entitled to recover because the evidence was "compelling that defendant sold unregistered stock in violation of the statute" (R. 409), rendering it unnecessary to consider "the ground of deceit based on misrepresentation" (R. 463).

Because of the *singleness of the cause of action* sued on we submit that, in the absence of an *adjudication*, it is not to be assumed that this action was barred by mere lapse of time before the 1941 law was passed. Had the action sought recovery only on the ground of statutory violation there might have been plausibility in assuming that it was so barred. On the other hand, had it counted only on common-law fraud, the action indisputably could not be deemed to have been barred because of the finding as to belated discovery of the fraud. But, since we sued on a single cause of action for redress on account of a single and entire tortious sale, based upon blended statutory violation and common-law fraud, the unreversed findings of the trial court should not be segregated for the sole purpose of establishing a legalistic theory, opposed to equity, that the cause of action was partly barred and partly unbarred.

In any event, appellant rests its appeal on an assertion that there were two separate causes of action, as shown under our Point I, *supra*. It makes no claim that this ac-

tion is in whole or in part barred, excepting as a supposedly separate cause of action was declared to be barred by an *adjudication* on the first appeal. We respectfully submit that, in this situation, this Court would not be justified in basing a decision upon an assumption that any part of the action was barred under Minnesota law before the 1941 law was enacted.

As we read this Court's opinion in *Tiller vs. Atlantic Coast Line R. Co.* (Jan. 15, 1945), 89 L. Ed. 403, 407 (next to the last paragraph), it supports an argument, by analogy, that the main consideration on this phase of the case is that appellant "has had notice from the very beginning" that plaintiff was trying to enforce an entire claim based upon the combined events that led up to a single tort. Therefore, "there is no reason to apply a statute of limitations."

(2)

The Decision Appealed from Is Sound Even If It Be Assumed That the Cause of Action Sued Upon Was Barred, in Whole or in Part, when the 1941 Law Was Passed.

Despite appellant's argument to the contrary, the decision of the Minnesota Supreme Court is supportable on either or both of two doctrines that have been long and frequently recognized by this Court: (1) The doctrine of *Campbell vs. Holt*, 115 U. S. 620, that a statutory bar against an action for the recovery of money constitutionally can be lifted by retroactive statute. (2) The doctrine that equitable considerations can justify lifting of the statutory bar, where vested property rights are not adversely involved.

(a) The Doctrine of Campbell vs. Holt, 115 U. S. 620, Remains Sound and Applies to This Case.

Appellant's contention that *Campbell vs. Holt* does not apply is based upon appellant's conceptions (a) that the doctrine of that case is limited to a holding that a *common law action* "for violation of an implied contract to pay money, previously barred by a *general* limitations statute, could be constitutionally revived by suspension of that statute"; and (b) that, *contrary to what the Minnesota Supreme Court decided*, this is not a *common-law action* to which a *general* limitations statute is applicable (Appellant's Brief, pp. 24-25).

For reasons shown hereinbefore, this action must be regarded as a common-law action which was governed by a general limitations statute. That leaves no basis for distinguishing the *Campbell Case*, unless, as intimated but not argued by appellant, a distinction is to be found in the fact that that case involved an action "for violation of an implied contract to pay money," while this is an action "in tort to recover as damages the purchase price of unregistered securities" (R. 404, f. 1818). What is said at pages 25-26 of appellant's brief shows that no such contention actually is made, for appellant there relies on the theory rejected by the state Supreme Court, that this is a suit on a statutory cause of action.

Appellant merely attempts to establish the applicability of *Danzer & Co. vs. Gulf & Ship Island Ry. Co.*, 268 U. S. 633, and *Davis vs. Mills*, 194 U. S. 451, complaining that the Minnesota Supreme Court erred in refusing to regard the former as being applicable, and in failing to comment upon the latter.

The *Danzer Case* involved a "cause of action * * *, created and limited by the Interstate Commerce Act." But, "the

vase at bar is to be distinguished," said the state Supreme Court, thereby unequivocally holding that plaintiff's right of recovery was not limited or conditioned by any Minnesota statute, general or special. The state court's construction of its own statutes should be final.

Appellant cites *Davis vs. Mills* in support of its argument that the provision which conditions enforcement of a right within a limited time, need not be found in the very statute which creates the right. But in the Davis Case, the qualifying statute was adopted after the enactment of the statute which created the right, and was directed to the liability "so specifically as to warrant saying that it qualified the right." Here, on the contrary, the six-year statute of limitations had existed more than fifty years before the enactment of the first Blue Sky Law in 1917, and the Minnesota Supreme Court properly determined that it did not condition plaintiff's right.

While *Davis vs. Mills* was not cited by the state Supreme Court, the conclusion reached that plaintiff's right of recovery was not conditioned by the general statute of limitations, is supported by settled law of Minnesota:

> "A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced; hence it relates to the remedy only."
>
> *In re Daniel's Estate*, 208 Minn. 420.

The Circumstances of This Case Do Not Call for Any Modification of the Doctrine of Campbell vs. Holt.

Forgetting that it stands before this Court as a tort feasor, and not merely as a contract debtor, appellant at pages 25-37 of its brief stages a crusade against *Campbell vs. Holt*, 115 U. S. 620.

Manifestly, there is no occasion for re-examining the cited

case. It dealt specifically with limitations on actions for the recovery of money on contractual obligations. In those cases the creditor invariably would know, or be bound to know, when his cause of action accrued. And, because a tort feasor can scarcely assert a stronger equity than a contract debtor, the doctrine of the *Campbell Case* can be no less appropriately applied to a tort case than to a contract case. Again, there are two classes of torts: (1) Those which naturally apprise the victim that he has a right of action the moment the tort is committed—*e. g.*, assault and battery, negligent injury, etc. (2) Those, such as the case at bar, where the nature of the tort is such that the victim may not actually discover within many years that he has a cause of action. (Appellant has not suggested how plaintiff could have discovered earlier than she did that appellant had violated the Blue Sky Law or had fraudulently concealed facts bearing upon the value of the stock and the advisability of buying it.)

Therefore, there is no occasion for reconsidering the justness and soundness of the *Campbell Case* as to contract debtors, or even as to tort feasors who are virtuous at least to the extent of letting their victims know when they are injured.

In the *Campbell Case*, *supra*, this Court first referred to instances where long and undisturbed *possession* of property, real or personal, gives title which cannot be divested after a statutory bar has become "perfect." Then the Court applied to contractual obligations for payment of money considerations which clearly are at least equally, if not more, applicable to a tort feasor's liability for inducing his victim to enter into a contract with him:

> "But we are of opinion that to remove the bar which the Statute of Limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground. . . .

"That the proposition is sound, that, in regard to debt or *assumpsit* on contract, the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed. * * * .

"It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

"It is to be observed that the term 'vested right' is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. * * *

"We certainly do not understand that a right to defeat a just debt by the Statute of Limitations is a vested right, so as to be beyond legislative power in a proper case. * * *

"We are unable to see how a man can be said to have property in the bar of the statute as a defense to his promise to pay. * * * It is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

"We can understand a right to enforce the payment of a lawful debt. * * * We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the Legislature from repealing that law, because its effect is to make him fulfill his honest obligations."

In the interest of brevity, we respectfully refer the Court to pages 16-22 of our previously filed "Statement Opposing Jurisdiction" for citations to authorities in the lower federal courts and in the state appellate courts which have approved and followed *Campbell vs. Holt* in diverse situations. Those citations are rendered specially relevant because of appellant's inaccurate assertion that courts generally have not followed *Campbell vs. Holt*.

There is another reason why it is unnecessary upon this appeal to reconsider the soundness of the *Campbell Case*. Apart from the holding of the *Campbell Case*, there is no constitutional objection to reviving a barred remedy *at a*

time when other remedies still exist.

Assuming, *arguendo*, what appellant claims, that plaintiff's so-called "separate statutory cause of action" was barred by lapse of time prior to 1941, it is clear that plaintiff still held an outstanding, unbarred remedy on other grounds.

In that situation, the legislature had ample power to revive the barred remedy.

Kipp vs. Johnson, 31 Minn. 360.

As there stated by Mr. Justice Mitchell, the lifting of the bar "would not be to divest him (the defendant) of any vested rights or property, but simply to increase the remedies or forms of action in which such rights might be tested."

Kipp vs. Johnson, *supra*, is consistent with the holding of this Court in

U. S. vs. Whited & Wheless, 246 U. S. 552,

that the barring of one remedy does not defeat the right to pursue other unbarred remedies.

Even in jurisdictions which, unlike Minnesota, have not fully followed the *Campbell Case*, the doctrine of *Kipp vs. Johnson* has been followed. A legislature may constitutionally revive a barred remedy at a time when other unbarred remedies still exist.

Power vs. Telford, 60 Miss. 195.

Davis vs. Minor (Miss.), 1 How. 183.

Alvord vs. Little, 16 Fla. 158.

(b) The Minnesota Supreme Court's Decision Is Sound Under a Well-established Equitable Doctrine.

As shown at pages 31-32 of its brief, appellant avoids a candid discussion of a well-established doctrine which is clearly applicable to this case. We refer to the doctrine which appellant seems to concede (p. 32) has been applied

to support the validity of retroactive statutes which serve "some strongly prevailing view of justice."

As applied to this case, the doctrine is probably best delineated—especially in its relationship to *Campbell vs. Holt*—by the decision by the New York Court of Appeals in *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271. The *Robinson Case* was specifically discussed by the Minnesota Supreme Court in its relation to one phase of the case at bar (R. 409). But appellant attempts to dismiss it from consideration on the summary ground that it, the New York Court, merely upheld a special statute "which allowed a widow to sue on a claim which had become barred *during the time she relied upon another statute* subsequently declared invalid." (Italics supplied.)

We submit that the considerations which led the New York Court to its conclusions justified the Minnesota Supreme Court in following that decision in the case at bar. In fact, there are stronger equities in this case. In the New York case plaintiff was merely lulled into reliance upon the validity of a statute afterwards held to be invalid—*a situation for which the defendant obviously was in no way at fault*. Here, the plaintiff had a right to rely upon an assumption that the appellant had obeyed the Blue Sky Law's provisions, at least so far as obedience was essential to a valid sale of stock. Therefore, plaintiff had no ground for even suspecting that she had a cause of action against appellant until she discovered the fraudulent and illegal character of *defendant's own acts* shortly before this action was brought.

Another superior consideration exists in this case in that the 1941 law operated to afford justice to many buyers of securities from appellant and other companies (R. 405) while in the New York case the bar of a statute seems to have been lifted for the benefit of one person.

In the *Robinson Case*, *supra*, plaintiff permitted limita-

tions to run under a wrongful death statute, relying upon a supposed remedy under a provision of the Workmen's Compensation Act. That provision was later held to be invalid. She then sued under the death statute, despite the running of limitations. The Appellate Division of the New York Supreme Court ruled that the action was barred. Then the legislature enacted a statute comparable to the 1941 law of Minnesota now under review. It permitted action in such cases to be brought within one year after the effective date of the act—just as the 1941 law did. Sustaining the constitutionality of the law, the Court of Appeals said, so far as here particularly in point:

> "The situation accidentally produced by reliance on an apparently valid statute reasonably calls for remedy. The bar of the statute *imposed for the protection of the defendants against belated claims* is being used to deprive a *plaintiff without fault of a cause of action based on defendants' wrong.* Here is no arbitrary deprivation by the Legislature of the rights of one party in order to confer a new right upon another party. The Legislature originally *gave this plaintiff a right of action against these defendants.* It imposed a bar after the expiration of a period of time during which it was *contemplated a plaintiff would have reasonable opportunity to enforce the right of action.* * * * She has suffered a legal wrong for which the Legislature gave a remedy, and * * * she has in effect been deprived of this remedy. The extension of time to bring her action was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application." (Italics supplied.)

Obviously, the reasoning adopted by the New York Court of Appeals supports a view in this case that instinct and reason must revolt at the appellant's invocation of the Due Process Clause as protecting it against liability for *its own wrong* on the ground that plaintiff did not sue in time when she was *practically prevented from suing earlier* than she

did *by appellant's own act* in concealing from her that she had any cause of action at all.

There is another consideration suggested by the decision of the New York Court of Appeals in the *Robinson Case, supra*. Until the Minnesota Supreme Court ruled *January 10, 1941*, by a vote of four to three, that limitations were not tolled by appellant's absence from the state (R. 362, 1766; 209 Minn. 166) there would have been good reason to believe that limitations had not run,—the belated discovery of appellant's fraud entirely aside. The chief justice and two associate justices who dissented were of the opinion that the majority opinion in *City Company of New York vs. Stern* (C. C. A. 8), 110 F. (2d) 601, gave "more satisfactory reasons for holding that the statute of limitations" had been tolled than did the opinion of the four members of the Minnesota Supreme Court who ruled that limitations had not been tolled (R. 362).

The decision in the *Robinson Case, supra*, is here specially important because this Court approvingly cited it in *Paramino Lumber Co. vs. Marshall*, 309 U. S. 370, 379, on the point that "superior equities" may support a statute which lifts a bar to review of a workmen's compensation award which has become final. This Court said:

> "* * * We do not agree that the immunity obtained by the lapse of time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim."

The *Paramino Case* did not, as claimed by appellant (p. 29), support the retroactive statute there involved on the narrow ground of curing a "fault of administration." It turned upon a consideration of the injustice that would result from refusing to provide a remedy whereby an injured employee could secure a rehearing after expiration of the time for reviewing a final award based on an erroneous find-

ing that he had fully recovered from an accident and had been fully compensated. The Act that was upheld by this Court in the cited case was a private Act of Congress which directed review of an award in a specific case.

This Court said:

> "This private act does not set aside a judgment, create a new right of action or direct the entry of an award. * * * It does not operate to create new obligations where none existed before."

Strong Equities Support the 1941 Law, Both in Its General Interpretation and in Its Application to the Case at Bar, by the Minnesota Supreme Court.

Before considering some of the most pertinent authorities in line with *Campbell vs. Holt*, 115 U. S. 620, and *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, above discussed, we briefly take stock of the equities of the case at bar, equities common to all cases covered by the 1941 law, and particularly those where, as here, the buyer of stock was excusably unaware of the seller's wrong until after the six-year statute had run.

We start with fundamental principles:

> Tort feasors, such as appellant, have no constitutional right to immunity from liability through mere lapse of time; immunity can come only through legislative grace.
>
> *Campbell vs. Holt*, 115 U. S. 620, *supra*.
>
> *Robinson vs. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, *supra*.
>
> *Hanenstein vs. Lynham*, 100 U. S. (10 Otto) 483.
>
> *Pittsburgh Can Co. vs. United States* (C. C. A. 3), 113 F. (2d) 824.

As recognized in Minnesota, statutes of limitation rest upon a theory that by *permitting* an obligor, for an *unreasonably long time*, to *believe that no claim exists against him*, the obligee is estopped to assert a claim.

Finley vs. Erickson, 122 Minn. 235, 239.

Important factors giving rise to such estoppel are *failure of the obligee to use ordinary diligence*, and resulting *disadvantage to the obligor*.

McMahan vs. Dorchester Fertilizer Co. (Md. C. A.), 40 Atl. (2d) 313, 315 (Adv.).

The Minnesota Supreme Court has decided that the statutes applicable to the case at bar pertain to remedy and not to substantive right (R. 406-407, par. 4).

In re Daniel's Estate, 208 Minn. 420.

That interpretation of the Minnesota statutes of limitation will be followed by this Court.

Dibble vs. Bellingham Bay Land Co., 163 U. S. 63, 73.

For the purposes of this appeal, the following facts conclusively appear:

"It is quite *obvious* that at the time the securities were sold, they were required by our law to be registered" (R. 404, par. 1). (Italics supplied.)

"* * * The evidence is compelling that defendant sold plaintiff unregistered stock in violation of the statute" (R. 409).

Plaintiff did not discover "the facts concerning the fraudulent and illegal acts of defendant * * * until on or about October 1, 1937" (R. 313, Finding XXXIV). The action was brought in November, 1937. The sale of the stock occurred August 10, 1929 (Appellant's Brief, p. 5). Therefore, at no time during the six years immediately following the sale, nor within the next two years and two months, did plaintiff know that she had any cause of action against appellant.

Nowhere in its brief does appellant assert that it was prejudiced by plaintiff's delay in suing. Appellant merely asserts that plaintiff "slept on her rights" (pp. 32-33), forgetting that it was appellant itself who induced the "slumber."

We believe that the Court will take judicial notice that the factual issues in actions of this kind are of such nature

as to depend but slightly, if at all, upon the testimony of witnesses who may die, disperse or become forgetful. As shown by the excerpts quoted above from the state Supreme Court's opinion, there were but two real issues: (1) Did the law require the securities to be registered? (2) Did appellant sell plaintiff unregistered securities? Obviously, those questions were almost completely answerable by such permanent records as the Blue Sky Law, the regulations under it, and the permanent corporate records of appellant.

It is to be specially noted that the 1941 law is by no means a measure that merely benefits purchasers of securities. On the contrary, the only benefit conferred upon them was that covered by the proviso. The main provision of the law confers a lasting advantage in favor of sellers of securities, in that, as noted by the Minnesota Supreme Court (R. 404, 405), it established a uniform six-year limitation upon actions of this kind, even when grounded upon failure to disclose nonregistration or misrepresentation as to registration, etc. Prior to that enactment, the Minnesota general statute declaring that limitations on a cause of action based on fraud runs from discovery of the fraud (*Mason's Minn. Stats. 1927*, Sec. 9191 (6)) applied to that ground of recovery.

See, *Mary Pickford Co. vs. Bayly Bros.*, 12 Cal. (2d) 501.

Furthermore, since the legislature allowed but one year after taking effect of the 1941 law within which a purchaser of securities might sue, whether upon the ground of violation of the statute or fraud, or both, the result is that those unfortunate purchasers of illegally sold stock who "slept" on their rights until after July 1, 1942, have not since that date had a remedy, although they still would have had one except for the 1941 law, on proving, as we did in this case, belated discovery of fraud.

In the light of the over-all advantage accorded to sellers of securities, they were the chief and primary beneficiaries of the new law. Obviously, the legislature intended the proviso there involved to operate secondarily as a just *saving clause* in favor of those purchasers who had actions pending or might bring them by July 1, 1942.

The 1941 law satisfies the test applied by this Court in *Graham vs. Goodcell*, 282 U. S. 409, in determining the validity of a retroactive act affecting limitations, namely, whether the act "can be applied without injustice."

Here present are considerations that prompted Mr. Justice Holmes, while chief justice in Massachusetts, to uphold the validity of a statute which revived a barred right of action (*Dunbar vs. Boston & P. R. Co.*, 181 Mass. 383, "where in short we cannot say that the legislature with its larger view of the facts may not have been satisfied that substantial justice required its action").

In *Danforth vs. Groton Water Co.*, 178 Mass. 472, the Massachusetts Supreme Judicial Court had affirmed a decision that condemnation proceedings were barred on a certain ground, and "the rescript had gone," before it was discovered that two weeks before the case was decided the Legislature had passed an act prohibiting dismissal of pending proceedings on the particular ground involved. The Court reversed its decision on motion for rehearing.

Speaking for the Court, Mr. Justice Holmes did not commit the Court to an unqualified approval of *Campbell vs. Holt*, but did say much that supports our position:

> "* * * Multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the *prevailing views of justice*, and if the obstacle in the way of the creation seemed small. In some such cases there has been at an earlier time an enforceable obligation, in

> others there never has been one, but in both classes the courts have laid hold of a *distinction between the remedy and the substantive right*, or have said that 'a party has *no vested right in a defense* based upon an informality *not affecting his substantial equities*' • • • or that 'there is *no such thing as a vested right to do wrong*,' • • • or have *dwelt upon the equities*, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make small repairs which a legislature naturally would possess."

That the principle here involved is applicable, not merely to retroactive statutes affecting limitations, but broadly applies whenever justice demands, is shown by this Court's reference in *Campbell vs. Holt*, 115 U. S. 620, to

> "numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action. • • • Of like character is the effect of a repeal of the laws against usury, in enabling parties to recover on contracts in which the law forbade such recovery before the repeal."

Without purporting to exhaust authorities which we regard as presenting analogies, we append notes covering typical cases most of which were decided by this Court.•

•(a) *West Side Belt R. Co. vs. Pittsburgh Coast. Co.* 219 U. S. 92, holding that a defense of illegality of a foreign corporation's contract for failure to secure a license can be abrogated, notwithstanding a prior final judgment in defendant's favor. See also: *Producers Naval Stores Co. vs. McAllister* (C. C. A. 5), 278 F. 13, cert. denied 258 U. S. 627; *Hughes vs. Union Savings Assn.* 132 Minn. 19.

(b) *Gross vs. United States Mortgage Co.*, 108 U. S. 477, upholding statute that abrogated defense that foreign corporation could not sue in state.

(c) *McNair vs. Knott*, 302 U. S. 369, deciding that no vested right was violated by validating pledges previously given by banks as securities for deposits.

(d) *Brown vs. Boston & M. R. R.*, 233 Mass. 502, holding that stockholders were not deprived of a vested right by validation of their corporation's *ultra vires* debt.

(e) *United States vs. Heinszen*, 206 U. S. 370, upholding a Federal act that ratified illegal collection of customs duties, although the importer had sued to recover payments. To the same effect is *Rafferty vs. Smith, Bell & Co.*, 257 U. S. 226.

III.

Appellant's Contention (Point 3) That the 1941 Law, as Construed and Applied by the Minnesota Supreme Court, Denied Appellant Equal Protection of the Law, Is Not Reviewable Because Not Seasonably Presented to, or Ever Passed Upon by, That Court. On the Merits, the Contention Is Frivolous, Because the 1941 Law Is Clearly General in Its Scope, and the Opinion of the State Supreme Court Cannot Be Interpreted as Limiting Its Application to Defendant or Any Other Particular Violators Singled Out for Special Treatment, as Appellant Contends.

(See Appellant's Brief, p. 35.)

(1)

Point Not Seasonably Presented.

Appellant does not pretend that it ever invoked the Equal Protection Clause before the Minnesota Supreme Court until it was done in the petition to that Court for rehearing after the case had been decided, which petition was denied without opinion and without ruling (R. 446, 448-450, 474, f. 1936).

As to its Point 3, appellant says nothing about preservation of ground for review below, excepting that the petition for rehearing asserted a violation of the Equal Protection Clause, in that the 1941 law, as construed, "constituted class

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(f) *Luria vs. United States*, 231 U. S. 9, 25-27, upholding retroactive effect of a Federal statute which created a presumption of nonintention to become a citizen, warranting cancellation of naturalization, in the absence of countervailing proof.

(g) *Leloup vs. Texas*, 184 U. S. 156, 158, recognizing the right of a state to apply to taxes already delinquent a new remedy for collection.

(h) *Ewell vs. Daggs*, 108 U. S. 143, holding that, because there is no vested right in a usury defense, repeal of usury statute permits recovery on contract antedating repeal. *Patterson vs. Berry* (C. C. A.), 125 F. 902, holding that defense of usury was taken away by a statute that raised the interest rate.

(i) *Berry vs. Clary*, 77 Me. 482, holding that defendant was not deprived of a "vested" right because a statute invalidated a defense that the contract sued on was made on Sunday.

(j) *Watson vs. Mercer*, 8 Pet. 88, and *Randall vs. Kreiger*, 90 U. S. (23 Wall.) 137, upholding the validity of a statute that cured defective acknowledgment of a deed.

or special legislation against appellant and in favor of purchasers of its stock (R. 446-452, ff. 1889-1897, Point V)." (Appellant's Brief, p. 10.)

Appellant's Points 2 and 3 are not coherent, although each starts out, "The 1941 law, as here construed and applied," etc. (pp. 20, 35). Point 2 does not show just how the law was construed. But the argument under Point 3 asserts that the law was construed as being directed against appellant and another company only (p. 37).

Another queer aspect of appellant's Point 3 lies in the fact that the argument under it is not responsive to the premise of the point that the 1941 law, as construed, reversed a [supposed] determination on the first appeal that this action is barred. The argument is limited to an attack upon the state Supreme Court's statement of facts which may have *influenced* the legislature in enacting the 1941 law.

A paragraph at pages 45-46 of appellant's brief, under its Point 4, suggests that appellant may attempt to excuse its delay in raising Point 3 until the petition for rehearing was filed, on the ground that it could not have anticipated the construction that the state Supreme Court placed upon the statute. But, as will be seen from a discussion below of the merits of appellant's Point 3, the construction actually placed upon the 1941 law by the Court precisely accords with the plain wording of the law. And, manifestly, appellant was bound to foresee that that interpretation would be placed upon the statute. This is especially so in view of the finding of the trial court that in so far as the 1941 law applied to the case, the action was brought in due time (R. 313-314, f. 1157).

The rule deducible from decisions of this Court cited below prevents consideration of appellant's belated contentions under both Points 3 and 4 of appellant's brief, and also wheresoever else in that brief the petition for rehearing is

relied upon as a seasonable preservation of ground for review of questions by this Court:

> Mere *presentation* of a constitutional question in such a petition does not give this Court jurisdiction; the question must have been *considered and explicitly overruled.*
>
> *Cumberland Coal Co. vs. Board of Revision*, 284 U. S. 23, 24.

The contention must have been *entertained and decided in the state court.*

Leigh vs. Green, 193 U. S. 79, 85.

Mallett vs. State of North Carolina, 181 U. S. 589, 592.

"A mere denial of the petition by the state court, without opinion is not enough."

Tidal Oil Co. vs. Flanagan, 263 U. S. 444, 455.

(2)

Appellant's Contention That the 1941 Law, as Construed and Applied, Violates the Equal Protection Clause Is So Manifestly Unsound as to Be Summarily Dismissible as Being Frivolous.

We have previously noted that nowhere in appellant's brief is the Minnesota Supreme Court's interpretation of the 1941 law either quoted or accurately summarized. At pages 35-36 appellant presents, as being the Court's *interpretation* of the law, what the Court "found" concerning circumstances which may have prompted the legislature to enact the statute. This is followed by reliance upon the familiar rule concerning the binding effect of a state Supreme Court's construction of a state statute (pp. 36-37). But that rule is applicable not to what the Court said as to factors that influenced the statute, but to the interpretation actually given to the statute in precise accord with its wording.

Let us first consider the wording of the statute and then the Court's interpretation.

First, the 1941 law prescribes a six-year limitation on *all actions of this kind* based upon illegal sales of securities in violation of provisions of the Blue Sky Law. Then follows, as part of the same sentence, the proviso, the constitutionality of which appellant now questions:

> "provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date" (R. 404).

And here is the Minnesota Supreme Court's interpretation:

> "The plain language of the proviso authorizes the bringing of *all causes where the delivery of the stock had been made more than five years before the effective date of the section*, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years *and less than six years* shall have elapsed,' etc." (R. 405, par. 3). (We have supplied only the first set of italics in the foregoing quotation.)

Because the 1941 law, as worded and as interpreted by the state Supreme Court, applies to illegal sales of stock, whomsoever the offender, the following observation at pages 38-39 of appellant's brief only serves indirectly to draw attention to the general operation of the law without discrimination:

> "There is no conceivably logical basis for legislation enacted for the specific purpose of restoring to purchasers of two stocks in Minnesota rights of action which were not restored to *purchasers of thousands of other stocks in this state during the period 'more than five years' prior to July 1, 1941*." (Italics supplied.)

Appellant thus intimates a concession that, if the 1941 law

applies to all other stocks sold within the period fixed by the statute, there was a "logical basis for legislation." It only remains to determine whether the law did so apply. The *interpretation* of the statute, above quoted, does make it applicable without regard to who sold the securities. Even the excerpt from the state Supreme Court's opinion, commenting upon well-known circumstances which may have *influenced the legislature* to enact the 1941 law, upon which appellant so insistently relies as being an *interpretation* of what was enacted, completely refutes appellant's contention that the statute and its interpretation were directed against appellant and the National City Company. The Court said:

> "That it"—the legislature—"had *all the cases similar to that at bar in mind can hardly be questioned, since in the general tenor of the section every aspect of them was covered.* It was well known that a multitude of sales *of this and other unregistered stock* had been made in this state *shortly before the 1929 crash.* The *evidence* in this case *shows* about 500 sales of Chase units in Minnesota by this defendant in 1929. [It is to be noted that here the Court did not intimate that the legislature had appellant or any other specific securities company in mind.] The legislature must have known that the great bulk of the violations had occurred prior to the crash and that few, if any, had occurred afterwards. * * * If the clause in the proviso relating to causes arising more than five years previously *were to be interpreted as defendant contends, it would apply to few, if any cases.*" (Italics supplied.)

We respectfully submit that what is said above clearly refutes appellant's chief contention under its Point 3:

> "As so construed and applied, the proviso of the law became a special statute which was designed and intended to reopen for a period of one year after July 1, 1941, all claims against appellant and National City Company, only, and as to 'this stock,' *only*; and to leave the bar of the limitations statute unchanged as to all

other corporations and securities, whatsoever their kind or nature" (p. 37).

The Minnesota Supreme Court's opinion does not mention the National City Company in its comments here involved, although that company was the defendant in the companion case decided by the Court on the authority of the decision in the case at bar (*Bain vs. National City Co.*, 216 Minn. 278-279). (No appeal to this Court was taken in that case.)

We invoke as being directly in point this Court's observation in *Quong Ham Wah Co. vs. Industrial Accident Commission*, 255 U. S. 445, 448, 449:

> "* * * If the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon."

Apart from the false premise that the 1941 law was specially aimed at appellant, we do not find in appellant's brief complaint against the classification of actions made by the statute. In fact, the statute favored securities companies by prescribing a one-year limit within which actions of this kind could be brought. This is shown by the Supreme Court's observation that the 1941 law operated to shorten the time within which actions of this kind, counting on common-law fraud, as distinguished from statutory violation, could be brought, although such actions might or might not have "accrued more than six years prior to the effective date of the statute" (R. 405). However, in passing, we draw attention to *Depoorest vs. City Bank Farmers Trust Co.*, 88 L. Ed. (Adv.) 340, 347, where an analogous classification was upheld against a contention that Equal Protection had been denied:

> "This statute does not purport to open accountings

> already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements *pending at* or *instituted after its enactment*." (Italics supplied.).

As noted at the opening of our argument of this Point (III), appellant's Point 3 (p. 35) is predicated upon an assumption that the 1941 law, as interpreted and applied by the state Supreme Court, "was enacted specifically to reverse the rule of law settled in appellant's favor on the first appeal," but nothing is said in the argument in support of that premise. However, if appellant be given the benefit of its argument under Points 2 and 3 as to what was decided on the first appeal, we would merely come back to the fact that nothing was *settled in appellant's favor*; there was a mere interlocutory ruling that limitations had not been tolled by appellant's absence from the state. Even if there had been inconsistency between the decisions on the two appeals appellant would be confronted by what this Court said in *Milwaukee Electric Ry. & L. Co. vs. State of Wisconsin*, 252 U. S. 100, 106:

> "But * * * the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, * * * any more than, in guaranteeing due process, it assures immunity from judicial error."

IV.

Appellant's Contention (Point 4) That the Minnesota Supreme Court Violated the Due Process Clause by Finding as to the Legislature's Intent in Enacting the 1941 Law, "Without Allowing Appellant a Trial of That Issue or an Opportunity to Know the Factual Basis for Such Finding," Is Not Reviewable Because (1) Ground for Review of the Contention Was Not Preserved in That Court, and Because (2) the Contention Turns Upon a Matter of Local Law and Practice. On the Merits, the Contention Is Frivolously Fallacious, Because (1) the State Supreme Court Did Not Found Its Interpretation of the Law Upon Extraneous Facts, But Upon the Plain Wording of the Statute, and Because (2) the Proof Proposed to Be Offered by Appellant Was Incompetent and Had No Tendency to Establish Legislative Intent.

(See Appellant's Brief, p. 40.)

Like appellant's Point 3, its Point 4 depends wholly upon the fallacious premise that what the Minnesota Supreme Court said concerning well-know facts which might have influenced the legislature to enact the 1941 law was the *interpretation* of the law. Here, again, appellant fails to quote the Court's interpretation, which gave effect to clear, broad statutory wording. But appellant predicates an argument upon the false premise that merely because the Court, in passing, drew inferences as to *why* the law was passed, "The question of legislative intent in this case ceased to be a pure question of law based alone on the words of the statute" (p. 42).

A.

Appellant's Point 4 Is Not Reviewable.

(1) Appellant's Offer of Proof Was Not Seasonably Made.

Appellant's contention that it was unconstitutionally denied opportunity to offer extraneous evidence as to legislative intent is not reviewable, because raised for the first time in a petition for rehearing in the state Supreme Court, and because the petition, which contained numerous other contentions, was denied without opinion.

Godchaux Co. vs. Estopinal, 251 U. S. 179, 181.

American Surety Co. vs. Baldwin, 287 U. S. 156, 163.

At pages 45-46 of its brief, appellant relies upon the doctrine of *Missouri vs. Gehner*, 281 U. S. 313, and *Brinkerhoff-Faris Trust & Savings Co. vs. Hill*, 281 U. S. 673, that this Court can review a Federal question first raised under a state court petition for rehearing, *where it could "not reasonably be held that the company was bound to anticipate such a construction."* (Italics supplied.) Here appellant was bound to anticipate the construction given the 1941 law, because the principal issue submitted to the state Supreme Court on the second appeal, was whether the law manifested legislative intent to lift the bar of limitations in actions of this particular kind. The trial court had found that the law did lift the bar (R. 313-314, f. 1157), and appellant assigned error in that finding on its second appeal (R. 384-385, ff. 1794-1795). Appellant does not claim that either party raised any *factual* issue as to legislative intent in the trial court or in the state Supreme Court, excepting appellant's attempt in its petition for rehearing. That Court clearly disposed of the question as a purely legal issue (R. 405-406, par. 3).

The principal and decisive conclusion reached by the State

Supreme Court was precisely what appellant was bound to anticipate if the ruling of the trial court should be upheld:

> "The plain language of the proviso authorizes the bringing of all causes where the delivery of the stock had been made before the effective date of limitation, if brought within one year from the effective date of the section, whether more than six years had elapsed since delivery or not; but it is the contention of the defendant that it should be interpreted as if it read 'more than five years and *less than six years shall have elapsed*,' etc." (R. 405, par. 3; 216 Minn. 273).

On the hearing of the second appeal appellant invoked the Due Process Clause only against a construction of the statute as lifting the bar of limitations (R. 406, par. 4; 216 Minn. 274).

(2) Appellant's Contention Is Dismissible Because It Involves Unreviewable Action by the State Supreme Court in a Matter Pertaining to Local Practice and Procedure.

Whether or not such evidence as appellant proposed to introduce in this case was admissible was a question as to which the Minnesota Supreme Court had the final say, because it pertained to the judicial construction of a state statute as applied to intrastate affairs. So, even if that Court made a "finding of fact" as to legislative intent, there is nothing here for review.

> "We may at once put aside . . . the assignments involving the construction by the supreme court of the state statutes, and rulings as to the admissibility of evidence."
>
> *Los Angeles Farming & M. Co. vs. City of Los Angeles*, 217 U. S. 217, 226.

Ohio Bell Tel. Co. vs. Public Utilities Comm., 301 U. S. 292, cited by appellant (p. 47) is readily distinguishable. There the evidence offered went to a vital factual issue in

the case. Here there was no issue as to what influenced the legislature in enacting an unambiguous law, and the Supreme Court interpreted it according to its plain meaning, as a matter of law.

B.

On the Merits of Appellant's Point 4.

(1) The Minnesota Supreme Court Founded Its Interpretation of the Statute, Not Upon Extraneous Facts, But Upon the Wording of the Enactment.

That the decision was based upon the intent of the legislature, *as manifested in the language of the statute*, clearly appears from the Court's declaration:

> "The plain language of the proviso authorizes the bringing of all causes," etc. (R. 405, f. 1821).

The state court did not "find"—in the sense that the validity of some judicial conclusions must be supported by findings of fact, which, in turn, must be sustained by evidence—as to just what prompted the legislature to enact the statute. The Court merely observed, in passing, that there was a plain *inference* that the legislature was dissatisfied with the law laid down by the Court on the first appeal in this case (R. 405, f. 1821).

That observation and the other related remarks of the Court concerning conditions that prompted the legislature to act were merely confirmatory within what this Court said in *United States vs. Missouri Pacific Ry. Co.*, 278 U. S. 269, 278:

> "But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."

That the state Supreme Court merely regarded the circumstances under which the statute was enacted as being con-

firmatory of an intent clearly expressed in the enactment itself is shown by the Court's observation that the legislative purpose was "expressed in clear language without qualification, and the circumstances under which the law was enacted *support the indicated purpose*" (R. 406, f. 1822).

(2) The Proof Proposed to Be Offered Was Incompetent and Had No Tendency to Establish Legislative Intent.

But, even if proper extraneous evidence as to legislative intent had been admissible and tendered seasonably, the fact would remain that appellant tendered no competent or pertinent evidence.

The scope of proof proposed to be offered by appellant is indicated by:

1. An affidavit of the state Commissioner of Securities that "he did not recall that he, or anyone in his department, or any member of the legislature expressed the desire to lift the bar as to any outlawed suits," etc. (R. 426, 427; Appellant's Brief, p. 42).

2. Affidavits of two members of the Minnesota House judiciary committee that no mention was made of the Supreme Court's opinion on the first appeal in committee meetings; and that no "intention was expressed by anyone to revive barred claims," etc. (R. 431-432; Appellant's Brief, p. 43).

3. Official legislative journals and committee reports showing "that in the legislative history of the law there was no affirmative evidence of an intention to revive the barred causes of action," etc. (R. 428-431; Appellant's Brief, p. 43).

A legislator cannot testify, in aid of statutory construction, as to the purpose of an amendment, or his understanding as to the intention of the legislature or of a committee that passed on the measure.

Wiseman vs. Madison Cadillac Co., 191 Ark. 1021.

Even when a statute is ambiguous, legislative intent can not be proved by affidavits of individual legislators or the governor.

Ocean-Forest Co. vs. Woodside, 184 S. C. 128.
City of Spokane vs. State, 198 Wash. 682.

In the last cited case, the Washington Supreme Court said:

> "They"—depositions of state officers and affidavits of legislators—"remain unread in the unbroken original package in which they were brought here; for it is perfectly clear, both upon reason and authority, that the legislative intent cannot be shown or proven in any such manner," citing numerous authorities.

> "The diverse character of such motives"—of individual legislators—"and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."
>
> *Sec. Hing vs. Crowley*, 113 U. S. 703, 711.

In *Moorman Mfg. Co. vs. Industrial Commission*, 241 Wis. 200:

> "We are not at liberty * * * to refer to Committee reports where there can be no doubt of the meaning of the words used."
>
> *Helvering vs. City Bank Farmers Trust Co.*, 296 U. S. 85, 89.

Nor can resort be had to the history of the legislation.
Wilbur vs. United States, 284 U. S. 231, 237.

Granting that, in proper cases, a court may examine legislative debates as part of legislative history, that practice is inapplicable in Minnesota, where the legislative journals do not record debates. Furthermore, appellant's so-called offer of proof was limited to a claim of *absence* of entries in the legislative journals concerning the bill for the 1941 law.

excepting formal recitals as to the introduction and passage of the bill.

What was said in *United States vs. Goldsmith* (C. C. A. 2), 108 Fed. (2d) 917, 919 (certiorari denied, 309 U. S. 678), refutes appellant's contention that legislative journals are of evidentiary value in this case:

> "The claim that the congressional proceedings on the amendment of 1934 disclose a lack of legislative intent to penalize the making of false statements— * * * that the intent was limited to the providing of penalties for wilful injuries— * * * we think is unsupported. At most, the evidence as to such intent is of a negative nature. * * *. In any event, such uncertain and at best negative evidence of legislative purpose cannot serve to limit the clear statement of the new statute."

CONCLUSION

The appeal should be dismissed for want of any properly presented Federal question. In so far as the Court may find that ground for review of any such question was preserved in the Minnesota Supreme Court, we assert that the judgment appealed from should be summarily affirmed because all of appellant's contentions are so fallacious as to be frivolous.

Respectfully submitted,

BENEDICT S. DEINARD,
HYMAN EDELMAN,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Appellees.

T. O. STREISSGUTH,
New Ulm, Minnesota,
GEORGE B. LEONARD,
ARTHUR E. H. STREET,
1036 Andrus Building,
Minneapolis, Minnesota,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 110.

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION, *Appellant*,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

PETITION FOR REHEARING

And

MOTION FOR STAY OF MANDATE

HENRY ROOT STERN,
FREDERICK H. STINCHFIELD,
SAMUEL S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

Hayward Brief Co., 529 So. Seventh St., Minneapolis 15, Minn.

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APPEAL FROM THE SUPREME COURT OF MINNESOTA.

PETITION FOR REHEARING

And

MOTION FOR STAY OF MANDATE

Appellant respectfully requests that it be granted a rehearing upon the opinion of the Court rendered herein on May 21, 1945, for the following reasons:

1. That this Court erred in considering and deciding the case as though there had been no final adjudication by the Minnesota Supreme Court on the claim for breach of statute, prior to the enactment of the 1941 limitations law, and, as a corollary thereto;

2. That this Court erred in concluding that the state court did not consider and decide the claim for breach

of the registration statute as a separate cause of action, and that such cause was not finally adjudicated;

3. That this Court erred in interpreting Minnesota law as meaning that breach of the registration statute and fraudulent misrepresentations in the sale of securities gave rise to a single common law cause of action in tort;

4. That this Court erred in concluding that such cases as *Baltimore Steamship Co. vs. Phillips*, 274 U. S. 316; 321; *New York Central R. R. vs. Kinney*, 260 U. S. 340, 346; *Seaboard Air Lines Ry. Co. vs. Koennecke*, 239 U. S. 352, 354, and *Fuder vs. Oregon Short Line R. R.*, 131 Minn. 317, are relevant to this case;

5. That this Court erred in concluding that statutes of limitations are not entitled to logical treatment in the law and that there can be a "right" where the "remedy" for its enforcement no longer exists;

6. That this Court erred in concluding that the stated public policy underlying statutes of limitation is not sufficiently "fundamental" to warrant the protection of the due process clause; and,

7. That this Court erred in concluding that statutes of limitation may be altered constitutionally by legislatures, even long after expiration of the originally prescribed period for suit.

Appellant submits that this Court overlooked or ignored certain matters of procedural history in this case and of law which, fully considered, should have resulted in a reversal of the judgment, more particularly on the question of prior final adjudication, and also on the broader question of legislative revival of causes of action long barred under existing law.

1.

It is evident that the assumption of "pending litigation" permeated the entire consideration of both of the major issues decided.

The error of this assumption is made apparent in the decision from which this appeal arose. There, in the second paragraph (R. 403), the state court said of its first adjudication:

> "On appeal, this court held that the general six year statute had run against plaintiff . . . ."

and, in the next to the final paragraph, said that the 1941 law

> "was passed subsequent to a determination by this court that the cause was barred" (R. 408-409).

It is beyond fair argument that the only "cause" that was before the State Supreme Court on the first appeal was the only one which had been decided by the trial court, namely, the "cause" based solely upon a violation of the registration statute and entirely "independent" of the fraud claim. If that appeal decided that the limitations statute "had run against plaintiff" and constituted "a determination by this court that the cause was barred," a final and separate adjudication of the cause that was before that court must have resulted. Even this Court's comment on the first appeal (paragraph 7):

> "The Supreme Court had confined its reversal to one question—whether the defendant's withdrawal from the state tolled the running of the statute of limitations."

acknowledges the finality of the adjudication that the "running" had not been tolled and, therefore, that the cause of action before that court was barred.

This Court's later conclusion (paragraph 8) that the "liability for statutory violation . . . was (not) finally or sepa-

rately adjudicated" is a non-sequitur, explainable as a misunderstanding of the precise character of the action and of the long procedural history. This Court overlooked the true legal effect of the first appeal, as declared by the highest state court, when it based its decision on the proposition that this was not a case "where a defendant's statutory immunity from suit had been finally adjudged so that legislative action deprived it of a final judgment in its favor," and when it said that the change of policy as to limitations could be constitutionally effected by the legislature because it occurred "before final adjudication."

This error is not one of general principle but of procedural fact, one which this Court should be disposed to correct, consistent with the undisputed record in the case.

Additional phases of this general ground of crucial error are set forth in succeeding grounds.

2.

This Court's conclusion that the state courts did not consider and decide the statutory claim as a separate cause of action is contrary to its own brief statement of the long procedural history of the case and to undisputed record facts.

This Court has noted that the first trial court held the action for violation of the Blue Sky Law to be one "upon a liability created by statute" and that it did not "pass on the fraud issues." But it erred in not also noting that the findings, conclusions and order for judgment of the trial court constituted a complete adjudication as to the statutory liability and that the trial judge expressly stated that his decision was not based on the "independent" claims of fraud. (R. 258; Appellant's Reply Brief, pp. 4-5).

This Court has noted that the State Supreme Court on the first appeal decided that the statute of limitations as to statu-

tory liability had not been tolled by appellant's absence from the state. This Court erred in not also noting that such appeal was upon all issues of statutory liability (whether there was a violation of the statute and whether the action was barred) and that a decision that limitations had not been tolled necessarily constituted a "determination . . . that the cause was barred," precisely as that court, on the second appeal said of its holding on the first appeal. From the very nature of the question of tolling, a reversal on that ground could have had no other legal effect. The limitations statute "had run." This Court's apparent view, that the result of the first appeal was merely a remanding of the case for retrial of the entire action, is contrary to reasonable inference from the state court decisions. It is patently contradicted by the State Supreme Court's own statement of what had been decided by the first appeal and by this Court's own statement of that adjudication (paragraph 7 of opinion).

The opinion also indicates an incomplete consideration of the procedural developments subsequent to the first appeal.

a. This Court failed to note that the appellees themselves believed the statutory claim had been finally adjudged against them. In their first motion, *before* the passage of the 1941 law, they moved only for findings on the question of fraud (R. 277-284). Not until *after* that law did they add a supplemental motion that their "cause of action" based upon illegal sale was "revived" by that law (R. 285-286).

b. This Court failed to note that, thereafter, the trial court itself clearly distinguished between that portion of the action relating to fraud and that portion relating to breach of statute in two respects: (1) There were separate findings as to each (paragraphs 16, 22-31, pertaining to fraud, and paragraphs 15 and 19, pertaining to violation of the

registration statute). A comparison of the findings on the second trial (R. 295-317) with the findings on the first trial which were expressly restricted to the breach of statute claim (R. 244, 259) shows the precise difference and the complete separateness of the two phases of the case. (2) Entirely different limitations statutes were applied to the separate claims. The general fraud-limitations statute, Section 9191, was applied by the trial court to the claim of fraud, and the new 1941 law was applied by the trial court to the claim of statutory breach (Finding XXXII, R. 313-314). Had there been only one cause of action, only one limitations statute would have been applied. Paragraph 5 of the opinion erroneously assumed that the trial court applied the 1941 limitations act to the entire action, an error arising from apparently another erroneous assumption made in paragraph 4 of the opinion (fifth sentence) that the 1941 act denied securities purchasers of the benefit of the general fraud limitations statute under which the time for commencing suit runs from the date of discovery (Sec. 9191, *Minn. Stat.*).

Appellees, in their final brief in the state court on the second appeal, themselves recognized the complete separateness of the two causes of action (Appellant's Reply Brief in this Court, p. 2, footnote 1).

This Court's failure to understand fully the distinction which the trial court twice made, between the entirely separate claims and the resulting applicability of entirely different limitations statutes to each of them, contributed further to the erroneous conclusion that the state courts treated the case as involving only a single common law cause of action.

c. This Court did note that the State Supreme Court on the second appeal reached its decision, not on the fraud phase of the case, but on appellant's failure to register the security. But it failed to note that this was the *third time* that the

state courts had decided the case on what the original trial court declared to be the "independent" ground of statutory liability. In all three adjudications, it was as though the fraud claim had never been made in the case. We submit that nothing the state courts could have said or done would have made the separateness of the two causes more clear.

3.

This Court also erred in its interpretation of the Minnesota law. The Drees case[1] held that the illegal sale supports a common law action in tort (as distinguished from one in contract) for violation of the registration statute *only*, just as the Minnesota courts previously had held in the *Vercellini* and *Webster* cases.[2] It did not hold or suggest that the plaintiff might combine in such cause of action an entirely separate cause of action for common law fraud, and thereby merge them into one cause of action.

On the contrary, the leading Minnesota case of *Olesen vs. Retzlaff*, 184 Minn. 624, which this Court seemingly overlooked, carefully drew a sharp distinction between a tort action predicated on breach of a duty created by statute and a tort action predicated upon common law fraud. That opinion said:

> "To make a cause of action [for breach of statute] it was not necessary to allege actual fraud or fraud which conceivably might be actionable at common law. * * * A violation of the statute gives the right of action. Nothing more is necessary if damage accrues. * * * Simple disobedience to the statute brings liability without the existence of other wrongdoing. * * *
>
> "There is no such action as this at common law. * * * We hold that an action which is based alone on section

[1] Drees vs. Minnesota Petroleum Co., 189 Minn. 608.

[2] Vercellini vs. U. S. L. Realty Co., 158 Minn. 72; Webster vs. U. S. L. Realty Co., 170 Minn. 360.

10407" (bank directors liability statute) is not an action to recover on the ground of fraud within section 9191 (6) (limitations governing fraud actions)."

* * * * * * * * * * *

"That there may be actual and actionable fraud justifying a recovery, apart from the statute, and within the meaning of section 9191 (6) is without much doubt." (This case was followed in *Burzinski vs. Kingon Investment Co.*, 192 Minn. 335, which involved the Blue Sky Law.)

The complaint in the *Olesen* case, as its record on appeal will show, contained no separate statement of the cause of action arising from violation of the statute, as distinguished from the cause of action for fraud. The allegations were intertwined as substantially as in the case at bar; yet the Minnesota court reached the conclusion that the cause of action for violation of statute was barred and that the cause of action for common law fraud was not barred regardless of that situation. It would indeed be strange if the form or labelling of paragraphs of a pleading, rather than its substance, could determine its legal character and effect. The Minnesota court has held to the contrary on several occasions, *e. g.*, *Dewing vs. Dewing*, 112 Minn. 316; *Bacich vs. Northland Transportation Co.*, 173 Minn. 538. This Court erred in attaching material significance to the fact that "no separate statement of the statutory cause of action is set out in the complaint in this case" (paragraph 8).

In the face of the well established principles of Minnesota law, it cannot be assumed that the use of the word "tort" by the State Supreme Court in the description of this action on the second appeal somehow merged the two separate causes into one. This separateness was recognized as a matter of law. It was carefully preserved by both parties and in the actions of the state courts at all stages of the litigation.

4.

In view of the three adjudications of the state courts solely on the claim of statutory breach (and the acknowledged lack of necessity to consider the "independent" claim of fraud), this Court erred in relying upon such cases as *Baltimore Steamship Co. vs. Phillips*, 274 U. S. 316, and *Tuder vs. Oregon Short Line R. R.*, 131 Minn. 317.

These decisions are inapplicable. Each expressly observed that the facts alleged and proved concerning the duty of care there involved were the same, and, for that reason, it was immaterial to recovery whether the duty was prescribed by federal or state statute or by common law. In all of these cases, the singleness of the cause of action arose out of the violation of the one duty of due care, whatever the basis of that duty might have been.[3]

In this case, on the other hand, all the state courts recognized that the facts as to violation of the registration law were different from the facts relating to the claimed fraud. Two separate duties were involved instead of the single duty of the cited cases. The State Supreme Court never did hold appellant liable for the violation of any duty as to fraud. It expressly declined to do so; yet it held appellant liable on the duty of registration.

[3] In **Seaboard Air Line R. Co. vs. Koennecke**, 239 U. S. 352, 354, this Court said: "The facts constituting the tort were the same, whichever law gave them that effect."

5, 6 and 7.

These grounds, relating to *Campbell vs. Holt*, are broader in scope and constitute matters largely of public policy. The opinion, we believe, shows inconsistent reasoning, with an overtone of apology for the conclusion that statutes of limitation have no logical place in our system of law, that they have a valid public purpose (but one which is not sufficiently "fundamental" as to be protected by the due process clause), and that such statutes may be the subject of legislative control even years after the cause of action has lapsed, although it is suggested that there might be some such manipulation as would create retroactive effects offensive to due process.

These observations overlook realities of public policy which this case presented to this Court and which at least two of its members pointedly recognized on the oral argument.

(a) Should the fiction of "a right without a remedy" be upheld by this Court?

(b) If a legislature is permitted to revive a cause of action barred by lapse of time, what are the limits upon legislative revival of a cause of action 10, 15 or 20 years old?

Counsel for appellees was unable to give sound answers to such questions at that time. The opinion of this Court admits their presence in the case but declines to face them squarely.

As to the first question, this Court concedes frankly (paragraph 13):

> "Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion."

It states the two views on the subject, but adds, "We do not need to settle these arguments." But, the troublesome proposition refuses to be so easily shelved. Rather *Campbell*

vs. Holt, which this Court holds applicable to this case (paragraph 10); is approved on this very ground: that only the remedy had been cut off by the original limitations statute, and that the right continued so that the remedy could constitutionally be restored by retroactive legislation (paragraph 15). In other words, the opinion does in fact "settle these arguments" in favor of the fiction of the right without a remedy. The opinion is subject to no other reasonable interpretation.

This Court, seemingly contrary to its own expressed intent, has preferred to preserve this fiction in the face of a public policy followed consistently by this Court from *Bell vs. Morrison* (1828), 26 U. S. (1 Pet.) 351, 7 L. Ed. 174, to *Order of Railway Telegrapher's vs. Railway Express Agency* (1944), 321 U. S. 342, 63 S. Ct. 582, "that the right to be free of stale claims in time comes to prevail over the right to prosecute them," and in the face of the admission in the opinion that the concept is "troublesome" and the view of at least two members of the court on the oral argument that it amounts to a "playing with words."

For all practical purposes, the legal effect of legislative revival of a stale claim is as prejudicial to the property rights of the prospective defendant as the effect of legislative creation, retroactively, of a claim against the same defendant. At the oral argument, appellees' counsel was unable to draw any distinction at all in this situation. We doubt that this Court is prepared to say now that there is any reasonable distinction. See *Terre Haute and Indianapolis Rd. Co. vs. Indiana* (1904), 194 U. S. 579, 48 L. Ed. 1124; *Ettor vs. Tacoma* (1912), 228 U. S. 148, 57 L. Ed. 773; *Coombes vs. Getz* (1931), 285 U. S. 434, 76 L. Ed. 866.

As to the second question, the opinion but glances at the problem as to how far a legislature might go in retroactively reviving barred claims. At two points, this Court suggests

that there is some limit. There is said to be "a relatively large degree of legislative control" as to limitations statutes, and it is possible that limitations statutes "could be so manipulated that their retroactive effects would offend the Constitution." It is difficult to suppose a more flagrant exercise of legislative power than was used in the 1941 law. As applied to this case, the revival was enacted six years *after* the original six-year period had expired. If, as this Court has held, the law was general in purpose (footnote 5 of opinion), it in legal effect revived all claims for non-registration back to the first Minnesota Securities Law, enacted in 1917. For one year following July 1, 1941, such claims as had become barred as early a. 1923 could have been sued upon eighteen years after the limitations period had expired or twenty-five years after the transactions in question!

If the 1941 law did not exceed the undefined permissible degree of legislative control suggested, then state legislatures have virtually absolute control which is beyond the protection of the federal due process clause. If the decision stands, it will defeat the very public policy which this Court has approved as to limitations statutes for the past 125 or more years, it will plague the courts with interminable litigation, it will encourage legislatures to yield to special interest groups whose claims, just or unjust, have long been barred under all existing law, and it will create an uncertainty in law and business relationships of far greater harm than that resulting from constitutional protection of the bar to a cause of action.

If, as the opinion and common sense mutually suggest, there is some limit beyond which a legislature may not go in such matters, we ask, as did certain members of this Court on oral argument, where can that line be drawn? We submit that there is only one realistic and just answer, that which is predicated upon the principle that a limitations

statute, once the period has run, extinguishes the right as well as the remedy and that a right of defense, so accrued, is a vested right protected by the federal due process clause.

For these reasons, appellant respectfully requests that this petition be granted and that a rehearing be allowed. The two principal questions are important not only to appellant but as legal precedent of nation-wide consequence in all courts and legislatures and to all persons against whom long barred claims may now be legislatively revived without possibility of due process protection.

Appellant also requests that issuance of the mandate be stayed until decision upon this petition and, if favorable, until final action of this Court after rehearing, for the reason that the judgment involved is one for money, that it is covered by supersedeas bond, and that unless a stay is granted, payment of the judgment must be made and the case would thereby become moot, to the great prejudice of appellant.

Dated: June 14, 1945.

Respectfully submitted,

HENRY ROOT STERN,
FREDERICK H. STINCHFIELD,
SAMUEL S. JENNINGS, JR.,
Counsel for Appellant.

JOHN M. PALMER,
FLOYD E. NELSON,
Of Counsel.

CERTIFICATE OF COUNSEL

Frederick H. Stinchfield, being one of counsel for appellant in the above case, hereby certifies that the foregoing "Petition for Rehearing and Motion for Stay of Mandate" is presented in good faith and not for purposes of delay.

Dated: June 14, 1945.

FREDERICK H. STINCHFIELD.

SUPREME COURT OF THE UNITED STATES.

No. 110—October Term, 1944.

Chase Securities Corporation, now known as Amerex Holding Corporation, Appellant, vs. Frank A. Donaldson and Frank A. Donaldson, Jr., Executors of the Estate of Ruth Chase Donaldson, Deceased.	Appeal from the Supreme Court of the State of Minnesota.

[May 21, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Minnesota attacks as violative of the Fourteenth Amendment a provision of the Minnesota statutes enacted as part of a general revision of the Minnesota Securities or Blue Sky Law. Its effect upon appellant was to lift the bar of the statute of limitations in a pending litigation, which appellant contends amounts to taking its property without due process of law.

This action was brought in state court in November, 1937, to recover the purchase price of "Chase units," sold by appellant in Minnesota to the appellee's testate August 10, 1929. The "units" had not been registered as required by the laws of that state. The action was based in part on illegality of the sale, but it also was grounded on common-law fraud and deceit. Defendant relied among other defenses on the statute of limitations. Plaintiff countered that the running of the statute had been suspended because defendant had withdrawn from the state and the statute did not run during its absence. The case was tried by the court without a jury. It found that there was a sale in violation of the Blue Sky Law, that the Minnesota 6-year statute of limitations applying to actions "upon a liability created by statute" governed the case but had been tolled by withdrawal of the appellant from the state in 1931. Judgment was therefore rendered for the purchase price adjusted for interest and dividends and the Court found it unnecessary to pass on the fraud issues.

The Supreme Court of Minnesota reversed.[1] It held by reference to a companion case[2] that the statute of limitations had not been tolled by the appellant's absence from the state because it had designated agents to receive service of process after its departure as required by statute. The case was remanded on January 10, 1941 without prejudice to further proceedings on "issues other than that of the tolling of the statute of limitations."

While proceedings were pending in the lower court, the legislature enacted a statute, effective July 1, 1941, which amended the Blue Sky Law in many particulars not pertinent here. The section in question added a specific statute of limitations applicable to actions based on violations of the Blue Sky Law[3] as to which there had been no provision except a general statute of

[1] Donaldson v. Chase Securities Corp., 209 Minn. 165.

[2] Pomeroy v. National City Co., 209 Minn. 155.

[3] The section reads:

"Other actions or prosecutions not limited.—No action shall be maintained for relief upon a sale of securities made in violation of any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or non-registration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date, and provided further that no purchaser of a security otherwise entitled thereto shall bring any action for relief of the character above set forth who shall have refused or failed, within 30 days after the receipt thereof by such purchaser, to accept a written offer from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of repayment, such interest to be computed at the same rate as the fixed interest or dividend rate, if any, provided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser on such securities. Any written offer so made to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commissioner of securities prior to the delivery thereof to such purchaser.

"Nothing in this section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the state to punish any person for any violation of law." Mason's Minn. St. 1941 Supp., §3096-24.

limitations. Under the former law the limitation on actions for fraud did not commence to run until its discovery. Under the new law, actions for failure to disclose non-registration or for misrepresentations concerning registration, or for falsity of representation implied from the fact of sale, all of which grounds were set up in this action, must be brought within six years of delivery of the securities. Aggrieved purchasers were therefore denied future benefit of suspension of the period of limitation during the time such frauds or grounds of action remained undiscovered. But it also was provided that where delivery had occurred more than five years prior to the effective date of the Act, which was the fact in this case, the action might be brought within one year after the law's enactment. The effect of this was to abolish any defense that appellant might otherwise have made under the Minnesota statutes of limitation.

Both appellant and appellee moved in the trial court, shortly after the Act became effective, for supplemental findings. Appellant asked findings in its favor on the theory that the action was barred, that the new Act was inapplicable, and that there was no proof of actual fraud. Appellee contended that the 1941 law applied and that by reason of it recovery was not barred. The trial court determined that the plaintiff was entitled to recover in tort both on the ground of an illegal sale and on the ground of common-law fraud and deceit; that plaintiff had not discovered the deception until shortly before the action was begun; that the provisions of the 1941 Act applied to the plaintiff's "cause of action, or any of the separate grounds of relief asserted by plaintiff," and operated to extend the time for the commencement of action thereon to July 1, 1942 and that plaintiff's action was therefore commenced within the time limited by the statutes of Minnesota. The appellant moved for amended findings and then for the first time raised the federal constitutional question that the statute, if applied so to lift the bar, deprived appellant of property without due process of law, in violation of the Fourteenth Amendment. Its motion was denied.

Appealing again to the Supreme Court of Minnesota, appellant among other things urged this federal constitutional question. The Supreme Court again did not reach decision of the fraud aspects of the case. It held that the Blue Sky Law required the securities to be registered and was violated by the sale; that the

action was one in tort to recover as damages the purchase price of unregistered securities sold in Minnesota; that the new limitations statute was applicable and had the effect of lifting any pre-existing bar of the general limitation statute and that in so doing it did not violate the due process clause of the Fourteenth Amendment. The court relied on *Campbell* v. *Holt*, 115 U. S. 620, saying, "We do not find that *Campbell* v. *Holt* has been reversed or reconsidered, and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court".[4] The judgment was therefore affirmed, rehearing was sought and denied,[5] and the case brought here by appeal.

As the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor. The lower court had decided against appellant. The Supreme Court had confined its reversal to one question—whether the defendant's withdrawal from the state tolled the running of

[4] Donaldson v. Chase Securities Corp., 216 Minn. 269, 276.

[5] The petition for rehearing for the first time raised two questions also urged here, but which may be disposed of shortly.

1. That the Act in question violated the Fourteenth Amendment in denying equal protection of the law. Even if seasonably made, which is doubtful, (See American Surety Co. v. Baldwin, 287 U. S. 156) the claim is without merit. The statute on its face is a general one, applying to all similarly situated persons or transactions. It appears that a number of cases were involved. Among other litigations were Stern v. National City Co. (D. C. Minn.), 25 F. Supp. 948, aff'd, *sub nom.* City Co. of New York v. Stern, (C. C. A. 8th), 110 F. 2d 601, rev'd, 312 U. S. 666; Chase Securities Corp. v. Vogel, (C. C. A. 8th), 116 F. 2d 607, rev'd, 312 U. S. 666. These were remanded by this Court to the Circuit Court of Appeals "for further proceedings with respect to any question not determined by the Supreme Court of Minnesota" in the *Pomeroy* and *Donaldson* cases. Also in this class of cases was Shepard v. City Co. of New York, (D. C. Minn.), 24 F. Supp. 682. That the motivation for the Act may have arisen in a few cases or in a single case would not establish that a general act such as we have described would deny equal protection.

2. The claim that appellant was denied due process of law because it had no opportunity to submit testimony of legislators as to legislative intent appears to us frivolous. The state court has seen fit to draw inferences as to the intent of an act from its timing and from its provisions and from background facts of public notoriety. But that does not mean that the judgment must be set aside to afford a party the opportunity to call legislators to prove that the court's inferences as to intent were wrong. Statutes ordinarily bespeak their own intention, and when their meaning is obscure or dubious a state court may determine for itself what sources of extra-statutory enlightenment it will consult. Our custom of going back of an act to explore legislative history does not obligate state courts to do so, and there is nothing in the Constitution which by the widest stretch of the imagination could be held to require taking testimony from a few or a majority of the legislators to prove legislative "intent."

the statute of limitations. The case was returned to the lower court without prejudice to any other question.

Appellant, however, insists that it was sued upon two separate and independent causes of action, one being "upon a liability created by statute," and that its immunity from suit on that cause of action had been finally adjudicated. The argument is not consistent with the holdings of the state court. The Blue Sky Law imposes duties upon a seller of certain securities, but it does not expressly define a liability for their omission or create a cause of action in favor of a buyer of unregistered securities. The state courts, nevertheless, held that such an illegal sale will support a common-law action in tort. *Drees* v. *Minnesota Petroleum Co.*, 189 Minn. 608. And on the second appeal of this case the court said, "The action was brought in tort to recover as damages the purchase price of unregistered securities . . . . It also sought recovery on the ground of deceit based on misrepresentation, but, in view of our disposition of the case, we need not consider that phase of the case."[6] It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action. Cf. *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321; *New York Central R. R.* v. *Kinney*, 260 U. S. 340, 346; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 354. This appears to be permitted by the law of Minnesota. *Tuller* v. *Oregon Short Line R. R.*, 131 Minn. 317, 318-19. It is true that the Supreme Court in disposing of the first appeal relied on a companion case in which it was said that "plaintiff must be considered to have sued 'upon a liability created by statute'."[7] The pleadings in the companion case are not before us. No separate statement of a statutory cause of action is set out in the complaint in this case. The state court did not dispose of the liability for statutory violation as a separate cause of action by dismissal or otherwise. We cannot say that it was finally or separately adjudicated. The state courts seem to have treated the complaint as setting up several bases for a single common-law cause of action in tort which had been remanded for retrial at the time the new statute was enacted. We must regard it in that same light.

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[6] Donaldson v. Chase Securities Corp., 210 Minn. 269, 270-71.

[7] Pomeroy v. National City Co., 209 Minn. 155, 156.

The substantial federal questions which survive the state court decision are whether this case is governed by *Campbell* v. *Holt* and if so, whether that case should be reconsidered and overruled.

In *Campbell* v. *Holt*, *supra*, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.[8]

Appellant asks that in case we find *Campbell* v. *Holt* controlling it be reconsidered and overruled. We are reminded that some state courts have not followed it in construing provisions of their constitutions similar to the due process clause.[9] Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpre-

[8] Appellant invokes the principle of our decisions in William Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633, and Davis v. Mills, 194 U. S. 451. But the state court so construed the relationship between its limitation acts and the state law creating the asserted liability as to make these cases inapplicable, and we do not think it did so improperly. In the *Danzer* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law. Read with the *Danzer* case, Davis v. Mills stands for the proposition that the result may be the same if the period of limitation is prescribed by a different statute if it "was directed to the newly created liability so specifically as to warrant saying that it qualified the right." 194 U. S. 454. But the situation here plainly does not parallel that in the *Danzer* case, and the state court whose province it is to construe state legislation has found no parallel to the *Davis* case. At the time this action was commenced the Blue Sky Law of Minnesota had imposed on appellant a duty; it had not explicitly created a liability. The liability was implied by the state's common law; the period of limitation was found only in the general statute of limitations enacted many years earlier. The state court concluded that the challenged statute did not confer on appellees a new right or subject appellants to a new liability. It considered that the effect of the legislation was merely to reinstate a lapsed remedy, that appellant had acquired no vested right to immunity from a remedy for its wrong in selling unregistered securities, and that reinstatement of the remedy by the state legislature did not infringe any federal right under the Fourteenth Amendment, as expounded by this Court in Campbell v. Holt.

[9] Wasson v. State, 187 Ark. 537; Bussey v. Bishop, 169 Ga. 251; Board of Education v. Blodgett, 155 Ill. 441; Jackson v. Evans, 184 Ky. 748; Wilkes County v. Forester, 204 N. C. 163; Raymer v. Comley Lumber Co., 169 Okla. 576; Cathey v. Weaver, 114 Tex. 513; Re Swan, 95 Utah 408; Eingartner v. Illinois Steel Co., 105 Wis. 373.

tation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.

We are also cited to some criticisms of *Campbell* v. *Holt* in legal literature.[10] But neither in volume nor in weight are they more impressive than has been directed at many decisions that deal with controversial and recurrent issues.

Statutes of limitations always have vexed the philosophical mind, for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription[11] limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim.[12] We do not need to settle these arguments.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of

[10] Appellant cites 2 Lewis' Sutherland, Statutory Construction (2d ed. 1904) § 768, p. 1288; 1 Wood, Limitations (4th ed. 1916) § 11, pp. 47-49; 24 Col. Law Rev. 803 (1924); 10 Corn. L. Q. 212 (1925); 2 Geo. Wash. Law Rev. 100 (1933); Bottschafer, Constitutional Law (1939) § 252, pp. 548-9.

[11] See La. Civ. Code, Arts. 3457-3459; Billings v. Hall, 7 Cal. 1, 4; Goddard's Heirs v. Urquhart, 6 La. 659, 673.

[12] See Gilbert v. Selleck, 93 Conn. 412; In re Daniel's Estate, 208 Minn. 420; Ruhs v. Cullum, 177 Pa. 633.

[13] For history of these acts see Atkinson, "Some Procedural Aspects of the Statute of Limitations", 27 Col. Law Rev. 157 (1927).

the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

This Court, in *Campbell* v. *Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of the reasoning of *Campbell* v. *Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote:

"Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing at those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield* v. *United States*, 167 U. S. 518, 523, 524. But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small. *Dunforth* v. *Groton Water Co.*, 178 Mass. 472, 476. This statement was approved and followed by the New York Court of Appeals in *Robinson* v. *Robins Dry Dock and Repair Co.*, 238 N. Y. 271.

The essential holding in *Campbell* v. *Holt*, so far as it applies to this case, is sound and should not be overruled. The Four-

teenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right. The judgment is affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.